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COMPETITIVE IMPLICATIONS OF THE SEVEN-STATION-RULE MODIFICATION

HEARING

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

NINETY-EIGHTH CONGRESS

SECOND SESSION

ON

THE PROPOSED CHANGES IN THE FEDERAL COMMUNICATIONS COMMISSION MULTIPLE-OWNERSHIP RULE, THE SEVEN-STATION RULE, AND THE EFFECT CHANGES IN THIS RULE MAY HAVE ON COMPETITION AND DIVERSITY IN THE TELEVISION MARKETPLACE

SEPTEMBER 11, 1984

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COMPETITIVE IMPLICATIONS OF THE SEVEN-STATION-RULE MODIFICATION

TUESDAY, SEPTEMBER 11, 1984

U.S. SENATE,
COMMITTEE ON THE JUDICIARY,
Washington, DC.

The committee met at 10:05 a.m., in room SD-226, Dirksen Senate Office Building, Hon Orrin G. Hatch (acting chairman) presiding.

Also present: Senators Grassley, Denton, Specter, Biden, Kennedy, Metzenbaum, DeConcini, and Heflin.

OPENING STATEMENT OF SENATOR ORRIN G. HATCH

Senator HATCH. On behalf of Chairman Thurmond, I would like to offer his apologies for being necessarily absent. He is in South Carolina, and has asked me to chair this hearing in his stead.

Now, this hearing is a positive and appropriate response to a July 25 request by Senators Wilson, Inouye, Kennedy, and myself that the Judiciary Committee hold hearings to review the proposed changes in the Federal Communications Commission multiple ownership rule, the seven-station rule, and the effect changes in this rule may have on competition and diversity in the television marketplace.

This July 25 request for these hearings was in direct response to concerns that the FCC based its proposals on outdated and arbitrary premises. In fact, the July 26 FCC report and order affirmed congressional concerns. Under the new order, the FCC abandoned the 7-7-7 rule in favor of a 12-12-12 rule, which removed all limitations of ownership of television stations by 1990.

Reflecting increasing congressional concern over the effect of these rules on competition and diversity in the television marketplace, on August 2, Senators Rudman and Inouye moved to impose a moratorium on the proceedings by amending the second supplemental appropriations bill in the Appropriations Committee. In approving the amendment, the committee members noted that without such a moratorium, the order may permit station acquisitions to occur before Congress could assess the impact such a fundamental policy shift would have on television viewers. Within a week, the full Senate agreed to the amendment

On August 9, Congressmen Wirth, Dingell, and Leland wrote to FCC Chairman Fowler, urging him to issue a stay of the 12-12-12 order. They expressed the belief that the order "fails to establish a long-term objective policy."

On the same day, they introduced legislation, H.R. 6134, to modify the seven-station rule by legislatively establishing a market reach index approach.

Also on August 9, Senator Packwood, chairman of the Senate Commerce Committee, wrote to Chairman Fowler, also urging the stay of the order to "allow the Commission and the Congress adequate time to examine the concerns raised by the decision."

In response to this heightened congressional interest in delaying the FCC's July 26 decision, on August 9, the FCC issued a stay of the television portion of the order until April 1, 1985, recognizing "the desirability of affording a full opportunity for reconsideration of the decision."

Despite this assurance of a self-imposed moratorium, Congress subsequently approved the modified version of the Rudman-Inouye amendment imposing a stay and thus conforming to the date set by the FCC until April 1, 1985. Following this action, on August 10, Senators Wilson, Inouye, Kennedy, and myself introduced a bill, S. 2692, to amend the seven-station rule by establishing a reach and number approach and providing incentives for investment in minority controlled stations.

At this point, I would like to note that the legal period for filing petitions with the FCC requesting reconsideration expired yesterday. Although the FCC, in its order of August 9, expressed its willingness to reconsider, I would also like to urge reconsideration but would urge the FCC to heed the counsel of the appropriations conference report "to proceed cautiously on this issue."

Let me just say that I do not advocate congressional rulemaking, but I do advocate rulemaker consultation with Congress. This hearing is likely to be the first of many on possible modifications in the multiple ownership rule. I expect that the House Committees on Energy and Commerce and on the Judiciary and the Senate Commerce Committee will hold hearings although perhaps not until next year.

This committee, as well, may hold additional hearings. As I mentioned earlier in my written statement, a provision in the second supplemental appropriations conference report mandates the FCC to proceed cautiously on this issue and to consult with the aforementioned committees "prior to taking any further action."

Hopefully, this hearing, together with followup hearings, will assist Congress in gaining the necessary background to play a constructive role in the consultative process.

Finally, let me briefly say that I did not believe the Commission established an overwhelming case for the 12-12-12 rule in its earlier rulemaking. Nor am I wedded completely to the precise reach percentage and number proposed in the Wilson bill which I had cosponsored. I welcome the witnesses who have consented to share their views with us today and we hope that together we can begin to build a useful record which ultimately supports a reasonable approach in today's marketplace.

We do have some other Senators who are going to attend, and our first witness was to be Senator Wilson. Let me just check with his counsel and see if he is anywhere near.

[Pause.]

I understand Senator Wilson is before another committee at this point, so we may have to take him out of turn.

Chairman Fowler, how long do you anticipate you will be?

Mr. **Fowler**. How long my testimony will be?

Senator **Hatch**. Your testimony.

Mr. **Fowler**. I would say maybe 10 minutes or so.

Senator **Hatch**. Well, why do we not proceed with Chairman Fowler and take your testimony. If Senator Wilson arrives, I may interrupt your testimony to allow him to give him his testimony.

Chairman Fowler, we are very happy to have you appear before the committee today. We know that you have a very hot seat that you sit on, and we understand the difficulties that you have, and we are very interested in hearing your testimony and, of course, we will have some questions for you.

So we will turn to you at this time.

STATEMENT OF HON. MARK FOWLER, CHAIRMAN, FEDERAL COMMUNICATIONS COMMISSION, ACCOMPANIED BY PETER K. PITSCH, CHIEF, OFFICE OF PLANS AND POLICY

Mr. **Fowler**. Thank you very much, Senator Hatch. I appreciate the opportunity to address your special concerns about the competitive effects of the Commission's recent decision revising our multiple ownership rules for broadcasting.

I would like to explain why the Commission decided that its action would foster competition in the relevant product and geographical markets, especially competition to the three major television networks.

While ownership restrictions in various forms had previously existed, the seven-station rule took its current form 30 years ago. The rule limits the number of stations in which a party can have a cognizable ownership interest to seven AM, seven FM, and seven television stations, no more than five of which can be VHF stations.

In 1956, only 2 years after the seven-station rule was adopted, the U.S. Supreme Court suggested that the Commission reexamine the continuing need for these regulations, "if time and changing circumstances reveal that the public interest is not served by their application."

In the three decades since 1954, the mass media marketplace has changed dramatically. The number of radio stations more than tripled and the number of TV stations has more than quadrupled.

On the basis of an extensive record comprised of comments from a wide range of interested parties, including comments from the Department of Justice and NTIA that a national ownership rule does not serve the public interest, the Commission concluded that a national ownership limitation did not foster either competition or diversity of viewpoint. Rather, it frustrated these goals by insulating the networks and broadcasters from more effective competition from group-owned stations. Allowing additional group ownership could not harm the intensity of competition in the local advertising and program distribution markets. And it could place additional competitive pressure on the networks as to national advertising.

Ironically, by restricting broadcast groups from achieving the efficiencies which could enable them to provide new programming choices, the rule likely protected the present Hollywood to network production-distribution structure. We believe that our decision to modify the multiple ownership rules will foster effective new competition to the three networks for prime time viewers. Also, because of the record of group owners in providing news and public affairs programming, the Commission concluded its goal of fostering viewpoint diversity would be strengthened by this action. These benefits, which I will explain more fully later, were the impetus for our action.

Nonetheless, out of an abundance of caution, and even though the Justice Department had said that the rule should be abolished in its entirety at this time, the Commission created a 6-year transitional period during which broadcasters could acquire up to 12 stations in each of the 3 services, AM, FM and TV. I should note that 12 stations today represents a smaller percentage of operating television stations than did seven stations in 1953. This measured approach assured the Commission an opportunity in 1990 to make sure that none of the conjectured problems did in fact arise.

Let me add that this rule change did not affect the duopoly, cross-ownership or one-to-a-market rules. Broadcasters can only own one TV station in a market, and are subject to other local ownership restrictions. As you know, both the Commission and Congress have acted to delay implementation of this modification as to television until April 1, 1985, or 60 days after the decision of the Commission on reconsideration of this matter, whichever is later.

Now, Senator, I would like to summarize the Commission's analysis of the competitive effects of our multiple ownership decision. As the members of this committee know full well, any competitive analysis must focus on relevant markets. Changes in the absolute size of a firm cannot harm competitive performance if they leave unaffected the ability of its competitors to respond to any attempt by it to increase prices. Thus, unquantified appeals to concepts like "network dominance" or "Hollywood dominance" are no substitute for rigorous analysis of relevant markets. Anyone positing a harm that will result from the Commission's action should be expected to explain how it affects the competitive balance in a particular market.

I will focus on the effect of the rule on the television industry since the controversy has centered there.

Three TV products markets are relevant to a competitive analysis of this rule: the television advertising market, the TV program distribution market, and the TV program acquisition market. I would like to consider briefly the likelihood of competitive harm resulting from our action in each of those markets.

Even adopting a worst case approach that radio and cable and video cassette recorders and other competing technologies are not substitutes for television, the record demonstrated that the national rule prevented no serious competitive harm but, to the contrary, likely impeded robust competition.

The Commission considered carefully the Department of Justice analysis of the advertising markets. The Department distinguished two relevant markets: a national market for network advertising and a local market for spot advertising. The former refers to advertising that is displayed in connection with nationally distributed television programs, and the latter to advertising that is broadcast by local stations and sold by the stations or their representatives. Advertisers seeking to reach limited geographic areas would not find it cost-effective to advertise on a network since they would be paying to reach many viewers outside of their target area. Advertisers seeking national coverage find it significantly cheaper, on the other hand, to obtain it in a single transaction from a network rather than negotiating a series of hundreds of spot contracts. Hence, Justice argues, the two markets are distinct.

Following this analysis of the relevant product and geographic markets for television, the Commission agreed with Justice's assessment that the likelihood of competitive harm was remote. The national advertising market is currently dominated by the three national networks because they are virtually the only nationwide television distribution services. Nonetheless, the elimination of the multiple-ownership rules will not increase concentration in the national network market because each network has already achieved access to almost every local market through its affiliation agreements. As for spot advertising, this is sold in local geographic markets. And since our rule change does not affect concentration in the local markets—for example, we still have our one to a market rule in place—a rule change would not affect competition in local spot advertising.

The fact that local competitors may share common ownership with stations in other markets is unimportant in terms of competitive harm. The important consideration is, instead, the Commission's local ownership rules. We believe that the prohibition against common ownership of two competing stations in the same market and service made the rule of sevens unnecessary as a guarantee against competitive harm in advertising markets.

Much of this same analysis applies to the TV program distribution market where the emphasis is on the number of TV outlets competing for viewers in the information and entertainment markets. In the advertising market, the question is what range of choice of outlets does an advertiser have. Here the question is what range of choice in ideas does a consumer have.

You judge viewpoint diversity in San Francisco, St. Louis, Salt Lake City and Philadelphia, for example, by the extent of sources of ideas available in those cities, not by whether those same or other ideas are available in other broadcast markets. Again, our restrictions on common ownership in local markets remain unchanged by this proceeding. National limitations on station ownership bear no necessary relationship to the number of independent viewpoints in a particular local market.

So there was a lack of relevance of the rule to local viewpoint diversity. And its elimination was therefore unlikely to have an adverse impact on the number of independent viewpoints available to individual consumers.

Even if one considers a hypothetical national market, the top 12 group owners of television stations, including the 3 national networks, earn only 34.9 percent of total industry revenues, 35 percent. Our staff's calculation, using the Department of Justice's preferred concentration measure, the Herfindahl-Hirschman Index, yielded a value of 229 for this hypothetical national television market. And as you know, the Department generally considers 1,000 to be the minimum level at which antitrust concerns are raised.

The third product market under consideration is that for program acquisition. The fear that networks would garner more control over program selection and gain bargaining power vis-a-vis Hollywood producers appears to motivate much of the recent opposition to the Commission's action.

With due respect for the sincerity of this concern, the record before the Commission leaves little doubt that this fear is unfounded.

Our decision was not pro network. Rather, it treated all who can own the stations the same. The networks' major role as program distributors is a function of their affiliate agreements, not their ownership of stations. And the affiliate arrangements are not and cannot be affected by this decision. Network programs are cleared about the same percent of time by all affiliates whether or not they are owned by the networks. Moreover, as Justice found, "acquisition of additional television stations by the networks should not impede any potential competitive benefits associated with the elimination of the ownership restrictions."

Acquisition of a local station by a broadcast network is essentially a vertical combination. Vertical integration is generally viewed as efficiency enhancing and, therefore, may improve broadcast operations. It has the potential for anticompetitive consequences only when most or all outlets in a significant area are commonly controlled. In that situation, rival networks or other sources of programming may be foreclosed from access to the public. The Commission's local ownership rules generally prevent a network from controlling more than one broadcast outlet, radio or TV, in a local market.

Given that safeguard, we did not believe that network acquisition of affiliates could have a significant effect on rival programming networks. The Department of Justice points out that affiliates have not played a major role in the formation of prime time ad hoc networks. Network affiliates already clear 97 percent of the networks' prime time schedules and 87 percent of the daytime feed. Network ownership of additional affiliated stations is thus very unlikely to hamper the formation of additional part-time networks. It is possible but, in our view, unlikely that networks would seek to acquire independent stations and maintain affiliation with other stations in the same market. But we, like the Department of Justice, would scrutinize such potential acquisitions very, very carefully.

I would like to close by highlighting some of the important potential benefits of the Commission's action.

First, there was strong record support for the contention that group owners show more local news programming and locally originated programming generally. Furthermore, group owned local news programs earn significantly higher ratings. Indeed, the tendency for these owners to air locally produced news programs instead of syndicated programs supplied by others may provide one explanation for the dismay that greeted our decision by representatives of the production and syndication communities. The availability of high quality local news programming, local public affairs programming, is something that both the Congress and the Commission have supported and encouraged over the years.

Some group owners may have cost advantages derived from economies of scale of owning some additional stations. These economies may mean that the cost to operate an additional station is less for a group owner than the cost of running a single station would be for a new owner. These economies of scale may stem from the ability to spread the services of management, bookkeeping, secretarial, sales and programming personnel over a number of stations, and the potential for group advertising sales and program purchases.

Advertising markets may become more competitive after the rule is relaxed. The Department of Justice pointed out that spot rates provide a loose constraint on network advertising rates, but that the greater transaction costs put them in a separate market. Thus, if larger nonnetwork groups do form as a result of our order, this could reduce the transaction costs of assembling wide area coverage via the spot market through these groups and actually put more pressure on network advertising rates.

Finally, and most importantly, raising the number of stations which a group may own could foster the development of new programming choices for the American people. Metromedia, for example, a major group owner, contents that it has invested significant resources in an attempt to, I am quoting here, "create new nonnetwork programs to provide product for independent stations and to provide viewing alternatives for the American consumers." But they go on to say that our old ownership rules have seriously impeded those efforts.

This argument was persuasive to the Commission because the creation of original television programming is an enormously expensive process. The existing affiliate structure provides each of the networks with more than 200 outlets against which each can amortize program production costs.

The Commission concluded that the larger station groups permitted by relaxing the rule might singularly or by combining together in ad hoc networks produce independent programming and challenge the networks' dominant position in prime time by giving viewers additional quality programming options.

Now, I realize that our July 26 decision resulted in a substantial amount of controversy. Perhaps this is not surprising. The multiple-ownership rules have been on the books almost as long as television has been a part of American life.

Aware of the concerns expressed by the Congress, the Commission stayed the effectiveness of the television portion of its decision pending a thorough reconsideration.

And, Senator Hatch, Senator Metzenbaum, and Senator Denton, you have my personal assurance, and I think I am speaking for the entire staff of the Commission and its Commissioners, that we will give fair and complete consideration to the objections raised by those parties petitioning for reconsideration of our decision. We will fully consider the possible weaknesses in our initial analysis that they may point out, and any alternative proposals that they may present. We are not pro-network, we are not pro-group, we are not pro-Hollywood, or anti-Hollywood. All these elements, networks, groups, and the Hollywood production community work together to provide the American public with more program choice. What we are is pro-viewer and the result we ultimately reach on reconsideration will reflect a pro-viewer bias, and that bias alone.

Again I want to thank all of you for the opportunity to speak with you today about our decision in this matter. I would be happy to answer any questions. I understand, of course, that Senator Wilson is here now so I will defer to whatever arrangements you wish to make.

[Prepared statement follows:]

STATEMENT OF
MARK S. FOWLER, CHAIRMAN
FEDERAL COMMUNICATIONS COMMISSION

SEPTEMBER 11, 1984

Mr. Chairman, members of the Committee, I appreciate the opportunity to address your special concerns about the competitive effects of the Commission's recent decision revising our multiple ownership rules for broadcasting. I would like to begin by providing some background information on the multiple ownership rules and then explain why the Commission decided its action would foster competition in the relevant product and geographical markets, especially competition to the three major television networks.

While ownership restrictions in various forms had previously existed, the Seven Station Rule took its current form thirty years ago. The rule limits the number of stations in which a party can have a cognizable ownership interest to seven AM, seven FM, and seven television, no more than five of which can be VHF stations. In adopting these limits, the Commission recognized two goals which ownership limitations were to achieve: 1) to maximize the diversification of "program and service viewpoints;" and 2) to prevent any "undue economic concentration contrary to the public interest."

In 1956, only two years after the "Seven Station Rule" was adopted, the United States Supreme Court suggested that the Commission reexamine the continuing need for these regulations, "if time and changing circumstances (revealed) that the 'public interest' is not served by (their) application...." In the three decades since 1954, the mass media marketplace has changed dramatically. The number of radio stations more than tripled and the number of TV stations more than quadrupled. Furthermore, while our conclusions did not rest on competing technologies such as cable, Multiple Distribution Systems, and home video recorders, these new technologies really are powerful factors in the entertainment market. Cable television has grown from an estimated 150 systems serving 30,000 subscribers in 1953 to approximately 6,400 systems with 32-35 million subscribers in 1984. Cable now passes two-thirds of all television households. Additionally, the existence of over 8.3 million home video cassette recorders ("VCRs") in American homes as of December, 1983, with cassettes available for rent as well as for purchase, adds a new dimension to programming diversity. Sales of VCR's are projected at 5 to 6 million annually over the next 5 years; VCR penetration is expected to reach 50 percent by 1990. Accordingly, on September 22, 1983, the Commission adopted a Notice of Proposed Rulemaking to explore the continuing need for, and the adverse competitive effects resulting from, this rule.

On the basis of an extensive record comprised of comments from a wide range of interested parties, including comments from the Department of Justice and NTIA that a national ownership rule does not serve the public interest, the Commission concluded that a national ownership limitation did not foster either competition or diversity of viewpoint. Rather it frustrated these goals by insulating the networks and broadcasters from more effective competition from group owned stations. Allowing additional group ownership could not harm the intensity of competition in the _local_ advertising and program distribution markets. And it could place additional competitive pressure on the networks as to _national_ advertising.

Ironically, by restricting broadcast groups from achieving the efficiencies which could enable them to provide new programs, the rule likely protected the present Hollywood to network production-distribution structure. We believe that our decision to modify the multiple ownership rules will foster effective new competition to the three networks for prime time viewers. Also, because of the record of group owners in providing news and public affairs programming, the Commission concluded its goal of fostering viewpoint diversity would be strengthened by this action. These benefits, which I will explain more fully later, were the impetus for our action.

Nonethelesss, out of an abundance of caution, the Commission created a six year transitional period, during which broadcasters could acquire up to 12 stations in each of the three services, AM radio, FM radio, and television. I should note that 12 stations today represents a smaller percentage of operating television stations than did 7 stations in 1953. This measured approach assured the Commission an opportunity in 1990 to make sure that none of the conjectured problems did in fact arise. Let me add that this rule change does not affect the duopoly, cross-ownership or one-to-a-market rules. Broadcasters can only own one TV station in a market, and are subject to other local ownership restrictions. As you know, both the Commission and Congress have acted to delay implementation of this modification as to television until April 1, 1985 or for 60 days after the Commission's reconsideration of its decision in this matter, whichever is later.

Now I would like to summarize the Commission's analysis of the competitive effects of our multiple ownership decision. As the members of this Committee know full well, any competitive analysis must focus on relevant markets. Changes in the absolute size of a firm can not harm competitive performance if they leave unaffected the ability of its competitors to respond to any attempt by it to increase prices. Thus, unquantified appeals to concepts like "Network dominance" or "Hollywood dominance" are no substitute for rigorous analysis of relevant markets. Anyone positing a harm that will result from the Commission's action should be expected to explain how it affects the competitive balance in a particular market.

I will focus on the effect of the rule on the television industry, since the controversy has centered there. Three TV product markets are relevant to a competitive analysis of this rule: the TV advertising market, the TV program distribution market, and the TV program acquisition market. I would like to consider briefly the likelihood of competitive harm resulting from our action in each of those markets. Even adopting a worst case approach that radio, cable, VCRs, and other competing techologies are not substitutes for television, the record demonstrated that the national rule prevented no serious competitive harm but to the contrary, likely impeded robust competition.

The Commission considered carefully the Department of Justice analysis of the advertising markets. The department distinguished two relevant markets: a national market for network advertising and a local market for spot advertising. The former refers to advertising that is displayed in connection with nationally distributed television programs and the latter to advertising that is broadcast by local stations and sold by the stations or their representatives. Advertisers seeking to reach limited geographic areas would not find it cost effective to advertise on the networks, since they would be paying to reach many viewers outside their target area. Advertisers seeking national coverage find it significantly cheaper to obtain it in a single transaction from a network rather than negotiating a series of spot contracts. Hence, Justice argues, the two markets are distinct.

Following this analysis of the relevant product and geographic markets for television, the Commission agreed with Justice's assessment that the likelihood of competitive harm was remote. The national advertising market is currently dominated by the three national networks, because they are virtually the only nationwide television distribution services. Nonetheless, elimination of the multiple ownership rules will not increase concentration in the national network market, because each network has already achieved access to almost every local market through its affiliation agreements. As for spot advertising, this is sold in local geographic markets. Since the rule does not affect concentration in those markets, a rule change would not affect competition in spot advertising.

The fact that local competitors may share common ownership with stations in other markets is unimportant in terms of competitive harm. The important consideration is, instead, the Commission's local ownership rules. We believe that the prohibition against common ownership of two competing stations in the same market and service made the "Rule of Sevens" unnecessary as a guarantee against competitive harm in advertising markets.

Much of this same analysis applies to the TV program distribution market where the emphasis is on the number of TV outlets competing for viewers in the information and entertainment markets. In the advertising market, the question is what range of choice of outlets does an adverstiser have. Here the question is, what range of choice in ideas does a consumer have. You judge viewpoint diversity in San Francisco, St. Louis and Philadelphia, for example, by the extent of sources of ideas available in those cities, not by whether those same or other ideas are available in other broadcast markets. Again, our restrictions on common ownership in local markets remain unchanged by this proceeding. National limitations on station ownership bear no necessary relationship to the number of independent viewpoints in a particular local market. So there was a lack of relevance of the rule to local viewpoint diversity. And its elimination was therefore unlikely to have an adverse impact on the number of independent viewpoints available to individual consumers.

The preceding analysis provides ample reason for concluding that elimination of the rule could result in no competitive harm in the program distribution market. However, even if one ignores the relevant local markets and considers a hypothetical national market, it is clear that there is no undue economic concentration for TV alone. The top twelve group owners of television stations--including the three national networks--earn only 34.9 percent of total industry revenues. Our staff's calculation, using the Department of Justice's preferred concentration measure, the Herfindahl-Hirschman index, yielded a value of 229 for the hypothetical national television market. The Department generally considers 1,000 to be the minimum level at which antitrust concerns are raised. This low level of concentration should not be surprising given that the number of television stations on the air has increased from 199 in 1953 to 1,169 in April 1984.

The third product market under consideration is that for program acquisition. The fear that networks would garner more control over program selection and gain bargaining power vis a vis Hollywood producers appears to motivate much of the recent opposition to the Commission's action. With due respect for the sincerity of this concern, the record before the Commission leaves little doubt that this fear is unfounded.

Our decision was not pro network. Rather, it treated all who own stations the same. The networks' major role as program distributors is a function of their affiliate arrangements not their ownership of stations, and the affiliate arrangements aren't affected by this decision. Network programs are cleared about the same percent of the time by all affiliates, whether or not they are owned by the networks. Moreover, as Justice found, "acquisition of additional television stations by the networks should not impede any potential competitive benefits associated with elimination of the ownership restrictions."

Acquisition of a local station by a broadcast network is essentially a vertical combination. Vertical integration is generally viewed as efficiency enhancing and therefore may improve broadcast operations. It has the potential for anticompetitive consequences only when most or all outlets in a significant area are commonly controlled. In that situation, rival networks or other sources of programming may be foreclosed from access to the public. The Commission's local ownership rules generally prevent a network from controlling more than one broadcast outlet; radio or TV, in a local market.

Given that safeguard, we did not believe that network acquisition of affiliates would have a significant effect on rival programming networks. The Department of Justice points out that affiliates have not played a major role in the formation of prime time ad hoc networks. Network affiliates already clear 97 percent of the networks' prime time schedules and 87 percent of the daytime feed. Network ownership of additional affiliated stations is thus unlikely to hamper the formation of additional part-time networks. It is possible, but in our view unlikely, that networks would seek to acquire independent stations and maintain affiliation with other stations in those markets. We, like the Department of Justice, would scrutinize such potential acquisitions carefully.

I would like to close by highlighting some of the important potential benefits of the Commission's action. First, there was strong record support for the contention that group owners show more local news programming and locally-originated programming generally. Furthermore, group owned local news programs earn significantly higher ratings. Indeed, the tendency for these owners to air locally-produced news programs instead of syndicated programs may provide one explanation for the dismay that greeted our decision by representatives of the production and syndication communities. The availability of high quality local news programming is something both Congress and the Commission have supported over the years.

Second, those stations with superior managerial abilities may be able to do a better job of matching programming to local tastes and thus garner larger audiences. In these cases, the owners who do a better job of satisfying consumer demands earn more from the station and hence value it more highly. Society is well-served by these acquisitions.

Third, some group owners may have cost advantages derived from economies of scale. These economies may mean that the cost to operate an additional station is less for a group owner than the cost of running a single station for a new owner. These economies of scale may stem from the ability to spread the services of management, bookkeeping, secretarial, sales, and programming personnel over a number of stations, and the potential for group advertising sales and program purchases.

Fourth, advertising markets may become more competitive after the rule is relaxed. Justice pointed out that spot rates provide a loose constraint on network rates, but that the greater transaction costs put them in a separate market. Thus, if larger non-network groups do form, this could reduce the transactions costs of assembling wide area coverage via the spot market, and actually put more pressure on network rates.

Finally, and most importantly, raising the number of stations which a group may own could foster the development of new programming. Metromedia, for example, a major group owner, contends that it has invested significant resources in an attempt to "create new non-network programs to provide product for independent stations and to provide viewing alternatives for the American consumers," but that our ownership rules have seriously impeded its efforts.

This argument was persuasive to the Commission because the creation of original television programming is an enormously expensive process. The existing affiliate structure provides each of the networks with more than 200 outlets against which it can amortize program costs. Under the old rule, the group owner could be assured of only seven outlets for its product. The result of this disadvantage is that the national advertising market takes on a high degree of importance for group owners: by obtaining national advertiser support for their independent programming, they can afford the production costs and compete with the networks. However, national advertisers typically require clearance in 75 percent of the nations' television homes before they will commit to a program. Today a group owner is unable itself to own enough stations to reach 75 percent of the market, and frequently is unable to obtain clearance for its programs from enough small owners to guarantee a 75 percent market reach. The Commission concluded that the larger station groups permitted by relaxing the rule might, singularly or in combination, produce independent programming and challenge the networks' dominant position in prime time by giving viewers additional quality options.

I realize that our July 26 decision resulted in a substantial amount of controversy. Perhaps this is not surprising. The multiple ownership rules have been on the books almost as long as television has been part of American life. Aware of the concerns expressed by Congress, the Commission stayed the effectiveness of the television portion of its decision pending a thorough reconsideration. You have my personal assurance, and I am sure that I am also speaking on behalf of my colleagues on the Commission, that we will give fair and complete consideration to the objections raised by those parties petitioning for reconsideration of our decision. We will fully consider the possible weaknesses in our initial analysis that they may point out and any alternative proposals that they may present. We are not pro network, pro group or anti-Hollywood. All these elements--networks, groups, and the Hollywood production community--work together to provide the American public with more program choice. What we are is pro-viewer, and the result we ultimately reach on reconsideration will reflect a pro-viewer bias, and that bias alone.

Again, I want to thank you for the opportunity to speak with you today about the Commission's decision in this matter. I would be happy to answer any questions that you may have concerning any aspect of that decision.

Senator HATCH. Thank you. We appreciate that, Chairman Fowler.

I think what we will do is we will interrupt at this point and allow Senator Wilson to present his testimony, and then we will call you back for questioning.

Mr. FOWLER. Well, thank you, sir. Very well.

Senator HATCH. Thank you. We appreciate your testimony.

Senator Wilson, we are happy to call at this time the distinguished Senator from California, Senator Pete Wilson, and we are very interested in your testimony as one of the principal sponsors of a major bill on this issue.

STATEMENT OF HON. PETE WILSON, A U.S. SENATOR FROM THE STATE OF CALIFORNIA

Senator WILSON. Well, thank you very much, Mr. Chairman. I am most grateful to the committee for conducting this hearing today on the subject of concentration of power in the broadcast industry, particularly during what is a very busy time for the Congress. Your willingness to respond affirmatively to the request sent to you by yourself, Mr. Chairman, by Senators Kennedy, Inouye, and myself, is a most gracious courtesy, and I think an indication of the importance of the subject which will be explored in depth today by your committee.

PROPOSED REPEAL OF 7-7-7 RULE HURTS CONSUMERS

Mr. Chairman, the genesis of today's hearing was the decision of the Federal Communications Commission to do away with a rule which has been with us for a very long time. The so-called 7-7-7 rule was adopted 31 years ago and was designed to prevent the three television networks, or any other single entity, from owning all of the radio and television outlets throughout the United States.

United States.

Some may call the FCC's decision good deregulation. Well, I am not so sure. In fact, I am quite sure it is not desirable deregulation. And let me say, Mr. Chairman, I am in almost every other instance a fervent supporter of deregulation. I think that by and large the bromide that the least government is the best government deserves to be a truism.

But, whenever I hear someone speak of deregulation, I am compelled to ask to what end are we deregulating? Is it actually going to result in an increase in competition that will benefit the American consumer?

Deregulation must not be looked at as an end in itself. It is merely a tool, a very important tool but, nonetheless, not an end in itself. In almost every instance, deregulation does foster competition, but not in every instance.

When a business is dependent for success on nothing more than a good idea and some capital, the Government should get out of the way. But when the very existence of a business is dependent on a Government allocation of the scarce commodity, such as a piece of the radio spectrum, regulation is the tool needed to foster competition. And without the 7-7-7 rule, competition in the broadcast industry will suffer.

If there were no scarcity of the resource upon which this business depends, I would support an end to regulation. Indeed, I would support an end to the FCC. But such is not the case.

Simply put, limited regulation of broadcasting serves the interest of competition. Deregulation, when coupled with a grant of a broadcast license, engenders a concentration of power in a very few hands. Or to put it most simply, it results in a lessening of competition.

7-7-7 RULE FOSTERS COMPETITION

To my way of thinking, one pro-competitive rule has been the 7-7-7 rule. Like few others, it has stood the test of time quite admirably. It has fostered ownership by a great many groups, thereby engendering some diversity in programming, availability of advertising outlets, and local editorial control. In other words, the rule has fostered competition in the marketplace.

Some suggest that while competition is desirable, it is inappropriate for the Federal Government to intervene in an attempt to achieve and maintain it. Well, I might agree ordinarily, but we must not lose sight of the fact that the broadcast spectrum is a scarce commodity as a matter of the laws of physics, at least as we understand them today. Therefore, the radio spectrum is allocated as a matter of necessity by the very same Federal Government.

The endless supply of paper and ink in this country is simply not equaled by the available broadcast spectrum. This fact allows for restraints otherwise unallowable or unjustifiable under the first amendment, or otherwise called for under the letter of our antitrust laws.

The first point explains why the Constitution can tolerate an equal-time provision and fairness doctrine being applied to the broadcast media while they would fall to a challenge if applied to newspapers.

The second point explains why there is a prohibition against any single entity owning two television outlets in any single market, regardless of the fact that the combined market share might fall well short of commonly accepted standards for antitrust review.

Federal communications policy has historically applied a much more strong and strict measure of concentration of power. Rigid producer analogies do not work when broadcast station ownership is at issue.

Mr. Chairman, it is a simple fact that the three television networks have access through their owned and operated stations and their affiliates to all of our country's television households. Why then should it matter if they were allowed to directly own all of these outlets or perhaps those that reach 40 to 50 percent of America? Why? Because an affiliate is not managed from New York. Its programming decisions are not made in New York. Its editorial policy is not formulated or reviewed in New York. Its decision whether or not to carry a network broadcast instead of a local college football game is not made in New York. And most of its profits do not go to New York.

Those who oppose ownership limits, including the Washington Post, which is owned by a television group owner, have argued that the great increase, almost sixfold, in the number of television stations over the past 31 years dictates an end to the 7-7-7 rule.

But as to the networks, an increase in the number of stations has not diminished their grasp upon the marketplace.

From the midfifties to the mideighties, the three networks have maintained a reach of approximately 20 percent. Beyond the issue of network control of the airways, there is a potential for unhealthy concentration of power in other group owners' for to the extent that they can extend their actual reach to a commanding portion of the American public, they can pose many of the same problems as do the networks. The potential is frankly much less, but it does exist.

THE NEED FOR COMPETITION IN BROADCASTING

Concentration of ownership of American broadcast outlets creates many problems, particularly as it increases. The fewer owners there are, the fewer sellers of advertising there are, necessarily raising advertising rates. This effect upon rates is not merely hypothetical. The Association of National Advertisers in a submission to the FCC noted that in cities with strong independent stations, there was a decrease in advertising rates of 20 to 60 percent—20 to 60 percent rate card advantage in those markets served by that competition.

The fewer owners there are, the higher the selling price of a station is and, therefore, the less likely it is that minorities will have any opportunity to operate a station. Despite the fact that licenses are available only from the Federal Government and that they are distributed almost free of charge, television stations today are selling at rates in excess of $200 million.

The fewer owners there are, the fewer people there are making editorial policy. With the great power of persuasion embodied in a television station, it is important that programming and editorial positions be set with sensitivity to the needs of the community being served. This point is particularly important in light of the recent deregulation of the license renewal process. The fewer owners there are, the fewer buyers of television programming there are, thus aggravating what is already an oligopoly.

To date, the Congress has been able to persuade the FCC to maintain the financial interest in syndication rules which restrict how much of a financial interest in a television show a network may extract from a producer, how much in-house production a network may undertake. The rules also prohibit syndication of shows by networks. There is a need for these rules because the networks have established their commanding positions as their direct result of Federal Governmental policies.

Only the networks purchase prime time television programs. They are the only buyers. But if they were allowed to purchase 12 or more television stations, they could create a network within a network. With this in place, they would have enough direct access to America's households that they could produce shows solely for their owned and operated stations, or just threaten to do so, thereby effectively undoing the protections of the existing financial interests and syndication rules.

The Congress must not sit by and watch a trashing of the rules at the back door when we have gone on record as opposed to such an action taking place at the front door.

THE DIVERSITY IN BROADCASTING ACT

Mr. Chairman, having reviewed some of the policy issues underlying today's hearing, I would now like to call to the committee's attention what at least four Members of the Senate, including two who are members of the committee, believe should be done.

First, the decision of the FCC regarding ownership limits on AM and FM radio stations which just recently went into effect should not be changed. A study of the radio industry does not uncover the same problems which I have outlined regarding the television industry.

Second, a new rule should be a permanent rule, meaning that it should not contain a sunset provision. A rule such as the 7-7-7 rule, which has stood for 31 years, should not be changed except by cautious and deliberate steps.

Third, a new rule should retain a limit on the number of television stations any one entity may own.

Fourth, in conjunction with the third factor, a new rule should contain a limit on the total reach of American television households any one entity may command. The reach concept was raised by Commissioner Dawson in her dissent to the FCC's decision in July, and it has been strongly endorsed in both Houses of the Congress. By limiting ownership on the basis of reach, the traditional antitrust concept of market share would be brought to bear.

At the top end of the scale, that is when looking at the networks and the large group owners, market reach is the best measure of market power. At the lower end, with only a market reach control, a single entity could, for example, buy up a station in almost every market in the Midwest. This could have bad effects on a regional level and also unreasonably bid up the prices of small stations.

Finally, there should be an incentive for minority group ownership and operation of stations. As I have noted, a station license is a matter of governmental grant. As a result, it is only fair that all members of all segments of society be given a reasonable opportunity to be at the receiving end.

Mr. Chairman, all of these concepts are embodied in legislation entitled the "Diversity in Broadcasting Act," which was introduced in August by the same group of Senators who requested this hearing today. The bill would limit the number of VHF stations any entity could own to 10, with a total reach of 22½ percent. The total VHF and UHF reach could not exceed 27½ percent. These limits would be increased if necessary to allow a company to enter into a joint venture with a minority group.

We hope that the Commission will carefully review this bill when it reconsiders its earlier decision.

CONGRESS ULTIMATELY RESPONSIBLE FOR COMMUNICATION'S POLICY

Mr. Chairman, there is currently in effect a congressionally mandated moratorium on further action by the FCC to implement a new rule on station ownership prior to April of next year.

I have been asked why other Senators and I insisted on such a legal proscription which is identical to a stay the FCC issued last month. Well, the reason is that it was felt desirable, if not necessary, for Congress to make clear its prerogatives in establishing communications policy.

The Federal Communications Commission is an article I institution. In other words, a creature of the Congress. It is referred to as an independent agency, but its independence is from the executive branch, not from the legislative branch. Therefore, the Commission should look to the Congress for direction in many forms, not just in the passage of new laws.

When Members of the Senate and the House take time to bring their views to the attention of the Commission, it should be of some import to the Commission. This is particularly true when the Houses are in general agreement. For instance, in setting a limit on television ownership, it would seem most reasonable for the Commission to adopt a limit on VHF reach of between 22½ percent and 25 percent.

The FCC was established to carry out the communcations policy of the United States. To a great extent, this necessarily encompasses the making of communications policy. Nevertheless, it is the Congress which is vested with the ultimate authority to establish the rules. It would be most productive if the Commission did not too often require a formal reaffirmation of this fact.

Mr. Chairman, I again wish to thank you. as well as your staff, for arranging this hearing today. I look forward to the development of an informative record which can serve as a basic source for the Senate as it carries out its responsibilities to avoid overconcentration of power in the television broadcast industry.

Senator HATCH. Thank you, Senator Wilson.

Are there any questions?

Senator METZENBAUM. Yes, I have a couple.

Senator, I have difficulty in comprehending how the FCC decides that 12 is better than 7. If 12 is better than 7, why is not 14 or 15 better than 12? I have difficulty in comprehending why 10 is better than 7, and how you figure out that the 22½ percent of penetration and 27½ percent are the correct figures.

I always have difficulty when somebody sets arbitrary limits. I wonder why, if it is better to go in one direction, why you do not go that much further, or why go into it at all. I would just like to get your rationale as to how you arrived at the conclusion that you did.

Senator WILSON. A very good question, and I would share that point of view because I think it is difficult, and indeed that concern is primarily what has prompted those of us who wrote the letter requesting this hearing.

You will recall that when the FCC acted in July, it set a sunset date after which there would be virtually unlimited ownership potential for any entity

Well, I will repeat what I said earlier. I think that it portends grave dangers to the American people. So the first answer tc your question, why not more than 12, frankly is that I think 12 is many too many.

Under the 7-7-7 rule, the networks are limited to five VHF stations. If they were permitted to go to 12, that is a 140-percent increase. They now have approximately 20 percent market reach. I frankly think that the increase they would be permitted would be virtually unlimited once that sunset provision has tolled.

It means they could have unlimited ownership, and that is simply too great a concentration of power. We, the Government of the United States, are allocating what is by the law of physics a limited resource. This concentration of power would result in a diminution of competition rather than an increase.

What we have done in the legislation that I just addressed is to attempt to set what we think is a reasonable increase that does not threaten that same kind of market concentration to the detriment of the American consumer.

Senator METZENBAUM. What I was asking is how do you figure that out? How do you determine that the 7-7-7 rule is not as good as 10? How do you determine that 27½ percent is the correct figure? I really do not know the answers to these questions.

But it occurs to me that the FCC is being arbitrary, and it would seem to me that your legislation is equally arbitrary, although in some modified form.

Senator WILSON. I do not think so. Let me tell you why.

We do not attach magic to this but we did not come lightly to the numbers. I think that they reflect a concern for two things. We had two worries. The first is that there not be an unreasonably large share of market reach leading to the kind of concentration of power that we have discussed. That is why we have said 22½ percent for VHF, or if there is compliance with the provisions that relate to minority ownership, that would permit a bonus and allow a maximum of 25 percent.

The number is to allow the kind of thing that would otherwise exclude minorities. We feel that without the provisions that we have, frankly, minorities would never have an opportunity to engage in real meaningful ownership. I think that the networks at the present time have sufficient ownership. I think that some minor increase perhaps would not cause the kind of overconcentration that we fear.

But with the market reach that they presently have, the reach limitation of 22½ percent allows the networks to grow somewhat, but prohibits them from acquiring significantly more. If you are looking purely at reach, then it is possible, without a limitation of number as well, to buy up a great number of stations, which is why we used the example that I did, which I would think would be of interest to the Senator from Ohio of being able to buy up a bunch of small stations in the Midwest. In other words, if you purchase 50 stations, which total in their market reach 2½ percent, then I think that you would have a dangerous situation, not nationally, but regionally.

What we are also seeking to do is to make real the opportunity for minorities to engage in television ownership.

Senator HATCH. Thank you very much, Senator Wilson.

Are there any other questions?

Let's call Mr. Fowler back. Chairman Fowler, we do have some questions for you.

Mr. FOWLER. All right, sir.

Senator HATCH. And perhaps I can begin.

Chairman Fowler, could you, please, comment on the Department of Justice conclusion that there are no substantial harms from repeal of the seven-station rule in a competitive sense, but that there would be no substantial benefits either?

Now, what I want to know is how the public interest is served by a 12-12-12 rule if there is substantial agreement or disagreement about the potential for benefits?

Mr. **FOWLER**. Senator, that is a very good question, and first I want to say you are quite right in observing that the Justice Department stated in somewhat unequivocal terms that the elimination of the rule posed no risk in any market relevant to antitrust analysis.

They did, in their comments, as you observed, question whether or not, although there would be some benefits perhaps to relaxing the rule, whether or not relaxation of the rule would foster competition with the networks, that is other programming choices. We think that that conclusion may not be correct because they base that on a study or prices of stations that were sold over a 20-year period under the seven-station limitation. And our economists of the Commission tell us that with a larger number capable of being owned by one entity, this may result in greater efficiencies as a result of those greater numbers of stations and, for the first time, provide us with an opportunity to foster alternate choices to the networks. That is to say that the old rule in one sense has forced companies to have to affiliate with the networks in order to get programming because they were not large enough to be able to do it themselves. They did not have the financial base. And the rule artificially kept them small.

So our economists tell us that, (a) the study of the Justice Department is based upon the old rule, and you really cannot draw any hard and fast conclusions.

Now, we cannot warrant at this point that we are going to have a lot of new large groups and a lot of new programming out there. But we think that there is a very good possibility we will.

Senator **HATCH**. I understand what you are saying.

But does what you are saying not mean less diversity in the final analysis?

Mr. **FOWLER**. Well, not necessarily, sir, because the relevant market for diversity is the local television market. And if a group owner buys, let's say, 12 stations and has 1 in each of 12 different States, let's say, it would not change diversity. For example, in Cleveland, OH, because we have a one-to-a-market rule, and it means that they could own one television station in Cleveland. And it means for purposes of diversity, which is a local market analysis, that would not be changed in any way. You still have the diversity that you had before.

In fact, the record shows that group broadcasters tend to provide more news and public affairs programming of a higher quality. They have won numerous awards. And we think that this change will result perhaps in more diversity in those local markets and more good programming for the viewer? And that is basically our touchstone: What is best for the viewer, How can we encourage alternate sources to network prime time programming? How can we provide the opportunity and means to improve the quality and the amount of local news and local public affairs programming?

And remember, seven stations back in 1953 when there were only 169 stations, we have 1,169 stations right now, and another 300 that will be on the air in the next year, comes out to about 40 television stations today.

Keep in mind that NTIA and Justice both said we should eliminate the rule entirely, and we see great public interest benefits in permitting groups to get bigger, to compete with the nets. But, we did not do that. We were very cautious. We said, well, we'll create a transitional period so we can see the positive and negative effects before the rule is renewed. We will raise it to 12. And we said that was very arbitrary, Senator Metzenbaum, and we admitted it was, but would use that number as a transitional mechanism to determine what happens during this period of time.

That is kind of a long answer to your question, but I think that Senator Metzenbaum's questions earlier, it is just exactly the right question. What do you use to determine the limitations and what is the rationale.

Senator **METZENBAUM**. Chairman Fowler, in connection with your testimony, you indicated that the Commission concluded that its goal of fostering viewpoint diversity would be strengthened by this action, and the predicate to that is that because of the record of group owners in providing news and public affairs programming.

Now, my question is that you seem to be saying that you increased the 7-7-7 rule to 12 because of the opportunity to enhance competition and to get better programming. But your emphasis comes about in connection with the group ownership, not with respect to the network ownership.

Now, frankly, I am having some great difficulty with this entire issue. As I understand your testimony, you seem to be saying that group ownership does do a better job of local programming and is procompetitive. And then you go on to say we should increase the number to 12, but not for just group ownership, but for the networks as well.

What thought has the Commission given to this question of whether the ceiling should be increased for both networks and group owners or only for group owners and how that ties in with your testimony.

Mr. **FOWLER**. In other words, why did we treat the networks the same as the group owners, is that the question, sir?

Senator **METZENBAUM**. I want to compliment you for stating my question in one short sentence. [Laughter.]

Mr. **FOWLER**. Senator Metzenbaum, that is a very good question. And the answer is basically this, that the dominance of the networks, and we share that concern, is one that is achieved by virtue of the fact that each of the networks has about 200-some affiliates out there. And through those affiliate relationships, they are able to reach almost all over the country.

Now, first of all, we ought to keep in mind that there is a caveat, that the networks do compete very fiercely with each other for every rating point that they can get. But having said that, this rule here, this ownership change cannot in any way affect those affiliate relationships. And therefore if you restrict the networks here and say you cannot have any more stations, but groups can because we want to foster competition, that does not in any way change the dominance that is achieved through the affiliate relationship. In other words, the record shows that the affiliates clear virtually 97 percent of the prime time programming, for example, that the networks offer them.

If a network buys one of its affiliates, that programming will still be the same. The dominance will still be the same, whoever owns the station.

Senator **Metzenbaum**. Are you not making a case out for increasing only the group ownership? It seems to me you are making that case rather than the opposite case.

Mr. **Fowler**. Well, what I am saying here is if you hold the nets back, you do not in any way negate the dominance, or the universality of programming that the networks provide, because that is achieved through the affiliate relationship. And if you let them have stations along with the groups, you do not in any way increase that dominance.

And looking at this from an administrative agency standpoint, we have got to be able to show a harm based on the record before we treat one player differently than another player. We could find no such harm.

Senator **Hatch**. Let me interject at this point.

It seems to me that all the advantages which the FCC seeks to promote by repealing the seven-station rule, you have talked about greater efficiencies, higher quality, more diverse programming, promotion of ad hoc networks, all of this could be accomplished by allowing, if you would, nonnetwork groups, nonnetwork group owners to increase their station ownership without allowing the networks to add more stations. And in fact if the networks do add more stations, will it not become harder in reality and in fact for the ad hoc networks in other programming alternatives to really develop or increase or throw it off?

Mr. **Fowler**. We looked at that question. It is a very good question, Senator, that we gave some thought to. And the records show that in most of the large markets where the groups either are or want to be, including the networks, there are many—3 to 13 independent stations—in each of the top 20 markets that are available for other networks, let us say a fourth network or an ad hoc network to hook up within that market in order to achieve a significant amount of coverage nationwide.

And the records also show that the affiliates, that is the television affiliates, very rarely preempt a network programming in order to join an ad hoc network. So again either way as to the television affiliates, you would neither encourage nor discourage ad hoc networks by permitting the networks to acquire up to 12 stations along with the group owners.

The important point I think here is that the way we are addressing the dominance problem is the way that we should have been and historically have, and that is to encourage and foster new competitors. And I think this rule, the very point of this rule is to provide the Metromedias, the Westinghouses of the world with the tools to get bigger, to be able to put together ad hoc networks, to engage in production of programming on their own, providing competitive alternatives to the networks and to the Hollywood production people by producing their own programming.

And we think that is in the public interest. And that is the long and short of it.

And the other point is we are not in any way increasing network dominance.

But the point I wanted to make is that through new technologies we are fostering, we can see the networks' audience of prime time beginning to come down. In the early 1970's, the three networks had about a 90 percent share of the television households in prime time. The figure now is down to about 76 percent. And in homes where they have pay cable, it is down well below 70 percent.

We have 30,000 applications on file now for low power television stations. Jim McKinney of our Mass Media Bureau has got a terrific problem. We are using a lottery which the Congress gave us to get that service out. And that will result in 2,000 or 3,000 new local television stations providing new sources of programming. That will be a tremendous shot in the arm.

Direct broadcast satellites authorized by this Commission will by 1990 provide at least six new national television networks by way of satellite. The satellites will be broadcasting directly into your home. You will have a dish on your roof.

Senator **Hatch**. Senator Metzenbaum and I were just commenting that we think you are making one heck of a good case for the groups but not for the networks. And for excluding the networks in your rule, or at least coming up with less or some sort of a modified approach like Senator Wilson has been talking about here today.

Mr. **Fowler**. The only way you could solve that problem would be to pass a law that prohibits stations from affiliating with networks or cuts down on the number of affiliates a network could have. And if you did that, you would have the entire American public screaming because they could not get the ABC Olympics. That is, the dominance comes from the affiliate relationship.

Senator **Metzenbaum**. I think that is a non sequitur. I do not think that it follows that you would have to prohibit the number of affiliates. Nobody is saying that.

The question is, How many of those affiliates will become network owned and network controlled?

Mr. **Fowler**. Yes, network owned and controlled.

How many nonaffiliates?

Senator **Metzenbaum**. I think I have a pretty open mind on this subject, but as I hear your testimony, you seem to be repeating the fact that increasing the number of group-owned stations helps competitively, helps them do programming, gets more local news and local effort involved, and then from there you move on to a conclusion to increase the ceiling for the networks to 12 also.

Then you respond to Senator Hatch: We do that because, realistically, they have so many affiliates anyhow that it does not matter whether they own the stations or they are just affiliates of the network.

So my real question is, and Senator Hatch has stated it correctly, What caused you to want to change the rule to 12 from 7 for the networks?

Mr. FOWLER. The answer, sir, is as follows: That we saw no reason, no harm to the public that would result from networks acquiring stations. And under the Administrative Procedures Act, we must find a harm based on a record in order to treat one set of players differently than another.

Now——

Senator METZENBAUM. In other words, let them have 20 or 30 or 40?

Senator HATCH. That is ultimately what he is saying. And over a period of 6 years, they will become completely free and deregulated.

Mr. FOWLER. Well, I just want to point out that the Justice Department found that there would not be competitive harm in any market in treating the networks the same as group owners. And the reason for that is that in the relevant local markets, that is where the competition is, both from an advertiser's standpoint, for local spot advertising, and also from the standpoint of ideas.

Because we have a one-to-a-market rule, that diversity would not change. Each of the television stations in each television market will continue under our one-to-a-market rule to be owned independent of the others. So the diversity is not affected in any way by permitting groups or networks to acquire more stations.

Senator HATCH. Let me make this comment, and then we will have to turn to other Senators. I have taken, between Senator Metzenbaum and myself, about 20 minutes here.

Although they say, the Justice Department concludes there will be no substantial harm, they also conclude there will be no substantial benefits from that approach as well. I think this is very significant here.

If I look at it, according to statistics, if we go with your rule, each of the networks could obtain, under your rule, just by adding additional stations, they could add seven additional stations, just for example, Philadelphia, Washington, Boston, Dallas, Fort Worth, Cleveland, Houston, Pittsburgh, to ABC, that would get them up to 34.224. CBS, if they added San Francisco, Boston, Detroit, Washington, Dallas, Fort Worth, Cleveland and Houston, they would be up to 34.025. And if NBC added Philadelphia, San Francisco, Boston, Detroit, Dallas, Fort Worth, Houston and Pittsburgh, they would be up to 34.224.

Now, if that is not detrimental to competition, I do not know what is.

Mr. FOWLER. Well, again, sir, my only——

Senator HATCH. I am looking at more than just economic competition. I am looking at it another way as well. But it certainly is a problem.

Mr. FOWLER. The record also shows that the networks, in terms of the local operations of the stations, that is local news and public affairs, they do not manage that from New York. If they tried to, they would flop on their face. They provide autonomy the record showed in almost all cases to the local management in terms of providing what local news and what local public affairs programming to put on the air.

In fact, there were two instances where stations, one in New York City and one in Chicago, were network owned, both the radio and the television station. In each city, the radio and television stations endorsed opposing candidates in an election. So the autonomy as to local news programming, we thought, was pretty well established.

So we do not see that as really being a problem. But we do see some benefits, and we ought not to lose sight of those. And when I talk about group ownership, I talk about the networks running stations as well as any other group. And those benefits we found to be quite substantial. They generally produce more and better local news and public affairs programming. They have won a great many awards.

After all, the touchstone on this seems to ought not to be the interest of the Hollywood producers or the networks or the group owners, but rather whether or not the viewers in particular markets are better off. And we believe they will be if we permit groups to be able to acquire other stations.

That does not mean that independently owned stations do not do very well. They do do very well in markets depending upon the owners and their management capabilities. But there are, the economists tell us, some very good efficiencies of results when an entity is able to grow larger. And this oftentimes serves our people very well in our society, and we ought not to lose sight of that.

Senator HATCH. Well, I have to say I have some serious questions about competition, not the least of which would be your statements concerning the HHI or the Herfindahl-Hirschman Index. I will get into those later perhaps.

Let me turn to Senator Denton at this point.

Senator DENTON. Thank you, Mr. Chairman.

I want to compliment you first on holding this hearing. We may have to vote on this issue, and obviously it is full of financial and perhaps cultural, competition and free enterprise implications I welcome the opportunity to learn more about the issues which this hearing permits.

Mr. Chairman, you are aware that we are getting conflicting predictions about the possible effect of the FCC proposal from the opposing sides. It is going to be difficult for those of us without expertise in this area to determine if the proposed 12-12-12 rule is in the Nation's best interest prior to any action that may be taken this year by the Congress.

I would like to ask some rather basic questions. I understand that the period from when your proposal is implemented until 1990 would be one in which we would examine that which took place rather than go on predictions. We would see what actually happened, and then review that bidding and perhaps establish some new rules.

Is that a correct statement of what you said?

Mr. FOWLER. Yes; that is correct, Senator Denton.

Senator DENTON. If the acquisition of 12 stations each of by the majors took place, or it all took place by the groups or some mixture which you have not anticipated, but one which resulted in something which you would agree was not stimulative of competition or productive of the common welfare, how do you undo in 1990 that which was already done rather than just set up some new rules to start with possession being nine points of the law and start from another set?

Mr. FOWLER. That is a very good question, Senator Denton. And we dealt with that in the order. We said that we are going to be very cautious here. The Justice Department and others told us we could eliminate the rule. We decided that out of an abundance of caution, because of alleged bad effects which some said could occur in markets, we would not eliminate the rule.

We decided, instead, to cautiously move to a higher number of 12. That transition period will give us a chance to be able to monitor the effects of these acquisitions.

Now, to specifically answer your question, each time one of these television stations was put before the Commission for a sale to another entity, that would be the time that the agency would look to determine whether or not it served the public interest. We always must make a determination that such a transfer is in the public interest. And in that way we would be able to carefully control and monitor the process as we went through the transition.

Senator DENTON. I would think that you would not know as each prospective transaction unfolded what the net effect might be at the end, and each individual judgment would be predicated on an assumption.

I still ask what would you do if in 1990 these acquisitions were not in accordance with your goal? You could not just take the stations away from the people, could you?

Mr. FOWLER. We could not. We could order divestiture though.

Senator DENTON. But would you, and would that be a practical remedy at that point?

Mr. FOWLER. We have done it before, sir, in certain egregious situations involving local ownership quite recently. And if we found that there was a threat to the competitive process, we would not hesitate to do so.

Senator DENTON. Could you assess the practical capability of groups such as Taft and others versus the networks to obtain the financing to buy the new stations, and then take some examples of each of the networks. I understand that some networks, do not currently own the maximum number of stations they could by law. What about the group owners? What is the practical likelihood that there would be a surge in ownership by one or the other, group network or specific owners within each category?

Mr. FOWLER. Senator Denton, since I am not privy to what their plans are, of course it is very difficult to predict what a network or group owner might do.

I have read in the trade publications that some of the groups are readying large sums of money, getting them ready. These funds are sequestered so that they can go out and make some acquisitions. I believe that Taft Broadcasting is one of those. These are the very kinds of people we want to encourage and foster to provide alternative programming choices.

That is the irony of the opposition here. It is posited from the standpoint that we are somehow engendering greater network dominance over television in this country, and that is not the case. We do not in any way change that in any significant way. But we do, by this very modest action, make it possible for other groups to get out there, and through ad hoc networks and other means, program production independent of Hollywood, provide new, we hope, innovative and good program choices. That is the key here.

We have approached this with the presumption that competition is better than Government regulation. And we think that the old system with seven stations essentially has served to preserve the dominance of the nets, and why not try something new and innovative to change that.

This is not an anti-network statement, I hasten to add. I am saying that they do a lot of very good things. They are not perfect, and we see that from time to time. And they have a great deal of influence. There is no question about it.

But the point here is how could we change that situation in a way that provides more consumer choice? I think we can do it. It is a very modest change. And this will give the Congress, I think, time, going from 7 to 12, to monitor along with us. If we, either together or separately, see that there are some significant problems which occur, or an increase in competition does not occur, an increase in concentration which is undesirable occurs, then we can either together or separately take the appropriate actions.

But I think we ought to have a presumption of relying on marketplace forces more and more and eliminating Government restrictions, especially here where the record is so clear that there are real benefits that are involved. And we do not see detriments.

Senator **Denton**. Thank you, Chairman Fowler.

Thank you, Mr. Chairman.

Mr. **Fowler**. Thank you, Senator.

Senator **Hatch**. Senator DeConcini, we will turn to you.

Senator **DeConcini**. Mr. Fowler, I appreciate your testimony, and Mr. Chairman, I am pleased that you are holding these hearings. And I ask that my opening statement be inserted in the record at the beginning.

Mr. Fowler, I was not here for all your statement but have looked at some of it here and listened to the discussion here.

I have yet to hear—maybe I missed it—your objections to some percentage limit of 22 or 25, or something. If you went into that, please refer that to me and I will not take up your time to repeat it. But maybe you can explain that to me.

What objection is there?

Mr. **Fowler**. Senator DeConcini, I had some difficulties because I think that the concept of reach introduces a needless complexity, and that there is a better way to do it in order to determine how you limit the growth of groups.

But having said that, I would be certainly open to that concept. If the Congress believes that that is a way to go, we are very sensitive to that, and there are a great number of Senators and others who have expressed an interest in using reach as well as on the House side. Congressman Leland for example. And so the answer there, sir, is that we would be happy to consider that.

Senator **DeConcini**. You probably have thought about it, where do you see the problem of trying to determine what the market is? Is that something that is difficult to achieve?

Mr. FOWLER. Well, when I looked at reach, the first thing I saw, Senator, was that it hurt Metromedia because Metromedia has a higher percentage right now, for example, than do the networks.

Now, Metromedia under John Kluge, who is one of the great broadcasters, is one of the groups that we most want to encourage. And I thought by using a number we would not—we would be able to encourage Metromedia as well as other groups. And Metromedia, as you know, was one of the instigators of some of the ad hoc networking that we have had.

For example, "On Stage America" was something that Metromedia did. It was a first run ad hoc network program. The same with legal and medical program; "Miller's Court" and "Health Beat." And I think that we want to encourage more of that kind of program choice on a national basis. That was one of the reasons.

The second reason was I know of no antitrust analysis that has ever used this concept of reach. They use market share. And we think that is a much better measurement.

The third point was that reach is an enumerator in search of a denominator. That is it indicates how many people one is potentially able to reach with a signal, but it does not measure how many people on an average that station does reach. So that an independent, unaffiliated television station, let's say in Washington or in Phoenix, is saddled with having the same number as a network VHF affiliate in that market, even though the market shares may be quite different.

In fact, in the top 20 markets, the average network VHF affiliate has an average audience share of about 23 percent, whereas an unaffiliated independent station in that market has an average in the top 20 markets, has an average share of about 6 percent. So that is another problem we have.

Now, I do not want to say that having all these complexities discussed here means that we cannot consider it and, indeed, we cannot implement it because I feel a very strong sense of some of the Congress that we ought to look at that. And indeed we will, very carefully.

Senator DECONCINI. Mr. Fowler, in your deliberations mission, do you take into consideration, or attempt to find out the cost or the potential investment cost of major expansion by networks or ad hoc networks or superstations, or just large investors of what kind of money we are talking about, if they could increase to 12, or as the Commission first came out, with no limit? Is that part of your study?

Mr. FOWLER. We did not attempt to determine what dollars would be required because it depends on each player's desires and what markets they want to be in. But we do know from the record that television properties that are acquired in the very largest markets, Senator, are very, very expensive. We know that from accounts of those that have sold. And we know there will not be any great rush.

The brokers have stated that they do not think when you effectuate this change, we will have a tremendous rush and all the stations will be sold tomorrow. They see this as a very gradual process.

There are a lot of people who do not want to sell their stations. They are doing very well. So it is difficult to get a station in a market that you want to be in to begin with.

Then the next point is are you the successful bidder as against others who want that station? And how much can you afford to pay? And then there are, of course, constraints on how much a buyer is willing to pay. That is to say, in a bidding situation, it may be quite the case that I decide not to buy a station and not to bid higher because I know that the cash flow that that station is generating does not justify any higher bid. And so I walk away.

So the answer to the question basically is it takes a lot of money and it will be a very gradual process.

Senator DECONCINI. Did you consider the fact that those that are in this business that have the limit now are likely to be the first bidders in an expansion program?

Mr. FOWLER. Not specifically, Senator, although I do not believe there are that many that are actually at the cap now of seven.

Senator DECONCINI. That was my next question. How many are at the cap?

Maybe you said that in your earlier statement.

Mr. FOWLER. I believe it is 12 altogether for television.

Senator DECONCINI. And excuse my ignorance for asking this technical question, but what happens—what happens if your rule was implemented, or the 12 rule was implemented, and one of the networks decided to buy an independent station or a nonnetwork station in a city where they had an affiliate? Would they still be able to do that?

Mr. FOWLER. Well, you put your finger on one of the troubling aspects of a network acquisition.

One problem we saw was that very case. And we said, as did Justice, that we would have very grave concerns about that. And I think we basically indicated to the networks that that would be an acquisition we would have a great deal of difficulty with. But I do not think the networks are that interested in buying those kinds of stations in any case.

Senator DECONCINI. My suggestion is that a network would not be prohibited from doing that unless the Commission said that that was anticompetitive or should not be done.

It would seem to me that you could put a lot of pressure on an affiliate to renegotiate the affiliate contract if the network would go out and purchase another station in the same market or the veiled threat that they might do that.

What does the Commission—did they address that possibility?

Mr. FOWLER. Senator, I think that it is encompassed within the language we put in the order which says that any of those kinds of acquisitions would be scrutinized very carefully.

I personally would have a lot of problems with granting that kind of an application. I cannot speak for the other Commissioners. But my sense is, though, that they would also have that same kind of a difficulty.

Senator DECONCINI. Under your original rule, or the 12 rule, would there be any limitation of buying a group owner's position, the network?

Mr. Fowler. Would there be any limitation of the networks buying a group owner?

Senator DeConcini. Yes.

Mr. Fowler. Under the seven-station rule?

Senator DeConcini. Yes.

Mr. Fowler. No, sir; there would not be. But once they ran up against the seven-station cap, obviously they could not go any further.

Senator DeConcini. And the same thing would apply if it was 12 or if it was the original rule which came out of no limit at all?

Mr. Fowler. That is correct, sir.

Senator DeConcini. Thank you, Mr. Chairman. Thank you.

Mr. Fowler. Thank you, Senator.

Senator Hatch. Thank you, Senator DeConcini.

We will now turn to Senator—Senator Wilson, if you do not mind, I am going to call on committee members and then you and I will finish.

Senator Specter.

Senator Specter. Thank you very much, Mr. Chairman.

Mr. Fowler, one concern that I have involves the way we consider these issues and how there is a flurry before the Appropriations Committee to cut off the enforcement of the rule by limiting the funds of the FCC to enforce the rule.

What kind of a time frame might there be before, say, an FCC rule like this one is put into operation to give the Congress some opportunity to review in a systematic way, as we are trying to do here today, instead of on the flurry of activity which pops up from time to time on a variety of issues, a lot from the FCC really in the course of the past several years, but to avoid having the arbitrariness and the artificiality of cutting off your funds from enforcing the rule so that we can have some more systematic way of taking up the question on the merits?

Mr. Fowler. Senator, I think that is one of the questions that a lot of people have asked. And I am not sure I know all the answers yet. But a lot of——

Senator Specter. Mechanically when the FCC puts a rule into effect, when is it implemented?

Mr. Fowler. It is implemented once we publish it in the Federal Register, and I think 30 days thereafter from publication it becomes effective.

Senator Specter. So there is no period of time for the Congress to consider whether we want to overrule you or not?

Mr. Fowler. Well, you have got that period of time obviously, sir. Then usually on major matters——

Senator Specter. But the only way we can do it, we cannot consider. We can barely schedule the hearing within 30 days. We really cannot give it a deliberate thought.

So that the only mechanism available is to rush into the Appropriations Committee which may have some supplemental and try to cut off your funds.

Is it true that that is the only practical way that it can be done at the present time?

Mr. Fowler. I think there are probably two possibilities, Senator, that might be of some help. One is oversight obviously. And in this case here, this proceeding took about a year so that during that period of time, it seems to me that oversight could be a very useful function.

Senator **Specter**. But the Congress did not know what the FCC was going to do.

Mr. **Fowler**. Well, that is true. But it certainly could—certainly the issues were well known. And it could have questioned us on various aspects.

Senator **Specter**. It seems to me it would be premature for the Congress to jump into an issue before the FCC has ruled on it.

What I am groping for is some way that there would be a period of time consistent with regular congressional procedures which would take a number of months for us to be able to review these matters, because there are vast interests involved.

Just speaking as one Senator, when the FCC comes down with a rule, and being on Appropriations, the matter is going to pop up immediately, we are beset with tremendous numbers of people who want us to make judgments on these issues.

So that I would look for a procedure where the Congress might have 6 months after you decide, after the Commission decides what it wants to do so we can consider this without the artificiality of cutting off your funds.

What would you think about that kind of procedure?

Mr. **Fowler**. I don't think we would have any objection. It might be a very excellent way to give you the time you need, sir, to look with thought and care at significant actions of any independent agency.

I am somewhat concerned though that our independence is being in some ways undermined by the process. And I say this now in an abstract way, not pertaining to this particular proceeding. That is to say that through the device of cutting off appropriations, of hearings when you are in the midst of a proceeding, letters from Congressmen saying we want you to do this or do that in the midst of a proceeding, it is very troubling to me as an independent agency Commissioner that perhaps the process is being in some way thwarted. That is the independence.

Now, having said that, I want to also stress that I think we are a creature of Congress and we should be sensitive to the mandate of Congress and to the specific concerns of the Congressmen.

I am just wondering how we do that in a way that is orderly and consistent with the process.

Senator **Specter**. Well, that is the precise point I am making, Commissioner, that we really ought not to be involved in your business until you make a decision. And that if we are going to speculate about what your decision is going to be and start to give you advice, it is the wrong time, it is premature. We ought to give you a chance to exercise your independent judgment.

But part of the reason that the Congress may get into it is there is no time after you make a judgment for us to express ourselves.

Giving full sway to your independence, it is appropriate for the Congress to disagree with you. And the Congress can enact laws, signed by the President, of the veto, et cetera, or override under our system where we can set the rules as we choose, being the agency to do that.

Mr. **Fowler**. Senator, I think that is a very thoughtful and perceptive comment. And I would be glad to discuss it with you further or work with you.

But something needs to be done to change this process somewhat and I am——

Senator **Specter**. Well, I say, just speaking for myself, the people want me to make judgments on the spur of the moment which are just too involved to come to any real judgment on. We need the time, and we are getting in this procedure. But I think we ought to institutionalize some opportunity for Congress to decide the issue.

Mr. Fowler, on the question of going to the merits, what is your expectation if you had to look into a crystal ball and say what is going to happen by 1990? Part of the concern in looking at this rule, and I know we are not bound by it in 1984, even if we move to the 12 rule, but what you expect to happen by 1990? Where would you expect the networks to go in the acquisition of television stations? Would you think the three major networks would all be at 12?

Mr. **Fowler**. Hard to tell. Again, we are not in a command economy so that I cannot give you a specific answer.

But I would expect that they would add stations and go up toward the ceiling by 1990, Senator Specter, because these television stations are very profitable. Of course, the constraint is that they are expensive. But they can be profitable if they are properly run and you get a good audience, which means you have got excellent programming, you will do very well. So that my view is the public interest is very well served here too.

I think, to answer your question in a larger sense, I think by 1990 we will see a lot more choices in prime time using over the year television by changing these rules.

Senator **Specter**. If we are to assess the impact of this rule considering the effect on cable, what is that going to do for the overall question of competition, and where are we heading on cable?

As we sit here, Washington, DC, still does not have cable. Now, if you are a Congressman, you can be plugged in and watch it on Capitol Hill, but when we go back to Georgetown at night, I cannot see cable. The city of Philadelphia still does not have cable for most of the city.

It is an amazing thing with the availability of cable that major markets still do not have it. And perhaps there will be cable with dishes or some technological change. But what is the impact of cable going to be on market concentration from the networks, a major concern that has been voiced here today?

Mr. **Fowler**. Senator, there are some studies that indicate where we have cable now that the networks, audience of prime time has gone down rather dramatically. For example, overall where there is a cable involved, the networks enjoy an audience of less than 70 percent, the three of them, in prime time. It is well below 70 percent, something like 67 or 66 percent right now.

Well, in 1970, it was over 90 percent that they enjoyed. What I am saying is we can see a steady erosion of a market share of the networks in prime time due to competing technology such as cable.

But you are quite right, cable has not moved as fast as it could have, and primarily some would say this is because of impediments that have been imposed at the local and the State level in awarding the franchises. The technology is there to wire the cities. And like so many other processes, people would point to the District of Columbia and how that process has taken a long time in order to choose a franchisee and get the city cable.

Senator HATCH. Senator, your time has expired.

Let's turn to Senator Heflin.

Senator HEFLIN. Well, Tom, we have a vote. I really have two questions and you can answer them in writing if you would like.

One, trace a little bit of the history of the 7-7-7 rule, the rationale that existed or the establishment, the reasons that your Commission now feels that that rationale is no longer applicable.

The second question is whether or not the FCC should be in some degree similar to the Federal Trade Commission, should be reviewed on an individual basis with certain standards as to competitiveness—for example, you have the oil industry, you have a lot of oil company mergers and acquisitions going on. They are reviewed in several different categories and, while acquisitions and mergers are approved, in some instances there are certain types of corrective actions taken as to certain segments of their overall business.

Now, those are my two questions that I am interested in.

Mr. FOWLER. Thank you, Senator Heflin. The history of the seven-station rule essentially is that in 1953 the Commission adopted a rule because it was concerned about preserving diversity and preventing concentration and as a result of that the commission admittedly on an arbitrary basis settled on the number of seven as the maximum number of television stations that a single entity could own.

If you were to determine on a proportional basis what that number would be today, with far greater numbers of television stations, more than four times as many, it would be almost 40. It was admittedly arbitrary and we looked at that after all these many years and said is it not time we reconsidered that, does it make sense in today's environment? So that in 1953 you had 169 television stations, in April 1984 you had 1,169 television stations, with another 300 coming on the air very shortly. And the basis we found for changing our rule was that the rule of seven actually stifled diversity, it denied the efficiencies of group ownership, it denied to the people the quality of local and public affairs programming that group owners traditionally have provided—and they have won a great many awards for it—and we did not see, nor did the Justice Department see any anticompetitive effect in any relevant market. And so on that basis we decided not to eliminate the rule, although as I indicated earlier, Justice recommended that we do so, not immediately, but rather, raise it consciously from 7 to 12 over a transition period stretching to 1990, at which time the entire prohibition would sunset. But that would give us a chance, Senator, to monitor carefully the results of further acquisitions to make sure that some of the alleged detriments in easing the rule would not in fact occur.

As to what we do in specific acquisitions, every television station acquisition requires the FCC to pass on it, an application must be filed. Under the statute, parties wishing to file objections to that proposed acquisition may do so and the Commission is under an obligation to fully consider all such petitions which are filed.

As one of the components of the public interest standard, we do look at competition. However, generally speaking, because concentration in television ownership is so low—never existed really—it has not been the kind of a problem that we have had to deal with very often. We did, however, take some steps—and I mentioned this earlier—to eliminate some egregious ownership situations on the local level involving, I believe, newspaper and television stations which were taken in the 1970's. And as I indicated earlier if we were to find as a result of looking at the transition, Senator, that there were further untoward results which occurred from this relaxation, the Commission would not hesitate to take the appropriate action, including divestiture.

I hope that answers your question.

Senator HEFLIN. Yes.

Senator HATCH. Thank you, Senator.

Senator Grassley.

Senator GRASSLEY. You had a discussion with Senator Denton that I wanted to follow up on, suggesting what you could look at during this interim period of time insofar as detecting detrimental effects. Could you give us any hint as to what you would consider detrimental or not? What sort of a measure would you use?

Mr. FOWLER. I would look at the relevant markets. I would look first at the advertiser markets, Senator Grassley. Is there any threat to competition in both the local and national advertising markets? I would look at the idea markets, that is, the local television markets, is there any lessening of diversity in these markets. And since we have a one-to-a-market rule, that is, you can own only one television station in a given market, we do not see how diversity can be lessened in that respect. That is to say those outlets will continue under our rules to be independently owned and operated one from the other in a given market. And those are the two main things we would be looking at.

Senator HATCH. One thing I have trouble with, network news has 100 percent penetration across the country and if they start gobbling up the local stations as well and they acquire—they could acquire total penetration and total control over everything that is disseminated from a news standpoint, a political standpoint, a program standpoint, the weather standpoint, et cetera. This is one of the things that bothers some of the people I chatted with concerning this bill.

Now, we have only 7½ minutes to go until this vote is over and I would like to turn to Senator Wilson. Senator Denton is coming right back from the floor to continue this hearing so we can go vote, and then I would like you to stay available, Mr. Fowler, until Senator Wilson can get back and ask any questions that he has. I am willing to submit any of my questions in writing, because I have others, and particularly with regard to the Herfindahl-Hirschman Index, because I think there are some questions there that need to be answered.

Mr. FOWLER. All right, sir. Thank you.

Senator HATCH. With that, if we can recess until Senator Denton gets here to take over, if he has any further questions he will continue and then if you will wait we will get back with Senator Wilson.

Mr. FOWLER. OK, sir.

Senator HATCH. We will recess until Senator Denton gets back.

[Short recess.]

Senator DENTON. In the interest of time, we will reconvene the hearing. The other committee members are voting. Senator Hatch had some questions that he wanted to address further to Chairman Fowler. On his behalf, I will ask those questions. Senator Wilson has further questions that he would like to ask and he will be back by the time we dispense with the answers to Senator Hatch's questions.

Chairman Fowler, would you comment on the benefits of a market reach approach, perhaps combined with a numerical limitation. Would that be more feasible and less arbitrary? Can it be easily administered? And how should it be selected?

Mr. FOWLER. Senator, I think I have indicated some of the complexities of using a reach approach, but it is possible that you could fashion a double limitation, that is a use of reach combined with a number, and that is something I think we will be looking at very, very carefully indeed during the reconsideration process.

Senator DENTON. I think the sense of the next question is if you did adopt a reach and number approach, and find it over this period of time to be desirable, then why sunset it out? Why have an automatic rule in there by which it would be sunsetted out and totally free after that, which seems to be your thrust?

Mr. FOWLER. The real question here is whether or not it is desirable to retain a restriction beyond 1990, and one of the reasons that we decided on a number was because it would be a very simple thing to administer, it would be administratively easier to administer than a reach concept, and we were looking toward a sunset, that is an elimination of these restrictions by 1990.

However, we also, Senator, will want to revisit the question of whether we sunset these restrictions or not and look at that very carefully and, having said that, it may make sense to also change the restriction, and I suggested that one may be what you suggested through Senator Hatch's question; that is, a combination number and reach.

Senator DENTON. The FCC's report and order argues that a change in the rules will not affect minority opportunities to participate in station ownership. Perhaps first the rule was not intended to do that in the first place; second, the current rule has not insured that minorities can afford broadcast stations today; and, third, even if prices go up, that is OK because that is the marketplace at work. What the chairman would like to know is how the change in the Commission's rules fosters minority ownership.

Mr. FOWLER. First, let me observe, Senator, that we have done a great deal at the agency since I have been Chairman, I believe, in cooperation with Commissioner Rivera, to foster new policies designed to promote minority ownership. And I will not go through that list, but I believe it is considerable. It is a very, I think, worthy and noble record.

Beyond that, I want to observe that the multiple ownership rules were never designed to promote minority ownership in TV. They never were before, and we do not see how through the ownership rules here it is possible in large markets in particular, where most of the minority viewers and listeners reside, to promote minority ownership because the prices for television stations are very, very high indeed, and typically minorities are the ones who have the problem the most in obtaining capital to acquire stations.

The point there is that we are working earnestly, together with other branches of the Government and the private sector, to provide, trying to provide more capital formation so that minorities can purchase stations. But if a station is out of reach of many Americans because it sells for $150 million and it should go to $175 million as a result of increased competition to purchase that station, I suspect that many of us, including minorities, were already priced out of that station in the first place. We do not see that this rule necessarily in any way works against minority ownership, but we do not see how in any meaningful way the ownership rules per se can work on behalf of minorities when it comes to these very expensive television stations. But we are targeting and have targeted attention to promulgating policies designed to foster minority ownership.

Senator DENTON. Do you firmly believe that this is the most appropriate way to enhance minority ownership of the stations or should there be some other vehicle for that?

Mr. FOWLER. Well, I think that we will want to look on reconsideration at that question as well. I am very interested in a proposal that Congressman Leland has made, along with Chairman Wirth. Senator Wilson's bill, I understand, has much the same kind of a concept and I think that is something that the agency should consider.

Senator HATCH. Let me just ask a couple of more questions and then I will submit more in writing and then we will return to Senator Wilson when he gets here. What exactly does the Commission's 12-12-12 rule do to insure the continued vitality of the prime time access rule? And let me just add one other to that. Would not allowing networks to own as many as 10 or 12 stations in the top-50 market diminish the opportunities for independent producers to program for the excess period; that is, the prime-time excess period?

Mr. FOWLER. We do not think so, for two reasons. One is that under the prime-time access rule as it stands now, my understanding is that a network owned and operated station may not purchase programming from off-network; and, second, under our syndication rules, networks may not syndicate that syndicated programming anywhere, in the domestic United States. So we do not see how this change here in any way has an impact on the prime-time access rule.

Senator HATCH. Thank you. Senator Wilson?

Senator WILSON. Thank you, Mr. Chairman. Frankly, I am concerned about the length of the list of witnesses. I find that the chairman and other members of the committee have asked most of my questions, so I would simply make a comment and then pass.

First a clarification of one point. I do not think the Chairman meant to misstate the issue, but I do not think the answer that he made to Senator Denton's question was quite as clear as it could have been. In 1990, when the sunset provision in the FCC rule takes effect, the rule which the FCC adopted in July, there would be no restraint on ownership, and I think that is a point that needs to be dwelled upon.

The only other point I would make, Mr. Chairman, is that the questioning has developed the fact that however desirable it may be for some of the groups to participate in what is an expanded number of television stations, the fact is the arguments that have been made for the groups do not apply with equal force to the networks. I think very candidly that the FCC Chairman's responses to those questions have made a rather compelling case that some modification should be made that would allow for some of the groups to achieve some greater ownership, but I think that it has not made the case that the networks should be included with the groups. Very much to the contrary, I think it has made a compelling case against that.

Having said that, I will simply express my gratitude to the Chair for the opportunity to participate as a member of the panel as well as a witness, and I will yield until we have had more witnesses before us. I am concerned that some of the people here who are waiting to testify may not get the opportunity to proceed.

Senator HATCH. Thank you so much, Senator Wilson. Unless there are further questions——

Senator SPECTER. Mr. Chairman, I do have just one more question.

Senator HATCH. Senator Specter.

Senator SPECTER. Mr. Fowler, I was asking about the impact of cable when my time expired. There may be some other questions that I want to submit in writing, but I would like to pursue this line for just a moment. In evaluating these rules, one of the important considerations would be the impact of cable in diminishing network share, as you have testified. Is there anything that the FCC could do or that Congress could do, as you see it, which would promote cable in areas like Washington, DC, or Philadelphia, so that we could get on with it and expand consumer access to cable and have that effect on the market, which would be an important consideration in our deliberation on this issue?

Mr. FOWLER. Yes, Senator, I think that it is desirable to try once and for all to work out the proper balance between the Federal, State and local authorities on the responsibilities that are involved in regulating cable. And as I have observed earlier to you, some would say that one of the reasons we do not have cable in Washington, DC, is because of a failure of local government over the years to move on with the program and to select a franchisee. But that has been true not just of Washington, DC, but of the suburbs in Virginia and Montgomery County as well and other areas. It seems that it has taken much longer than it would reasonably seem it would have to take for the governments to be able to (a) decide that they want to entertain a proposal for cable, and then (b) to determine who the franchisee should be. And I think that has been a great impediment to the development of cable, and we have been dedicated at the Federal level in attempting to free it from many of the shackles, regulatory and otherwise, that have been imposed not only at the Federal level but at the State level. But there is a Federal-State relationship that is a sensitive one and we have to pay some homage to that as well in working out what the proper relationship should be.

As you may know, there is an effort now to pass some legislation that deals with some of these very problems.

Senator SPECTER. Well, I do not disagree about paying some homage, but it seems like we are paying a lot. It is not only Washington, DC, and Philadelphia, it is a national problem to have cable move ahead. Is there something that the FCC can do to move the issue ahead so that Washington, DC, and Philadelphia gets cable?

Mr. FOWLER. We have done some things. We have preempted the pricing of pay cable programming which before was regulated by the cities, and this has met with great success in fostering more consumer choice over cable systems. But I think at this time we should defer to Congress on the larger question, Senator. I think frankly it looks as if it will get congressional attention.

Senator SPECTER. OK. What can Congress do?

Mr. FOWLER. Well, for example, in the manner in which a franchise is renewed, that is a very sensitive question. What kind of life expectancy does a cable system have? What ought it have? This is an issue that has been dealt with by the House in particular with cable legislation it is working on right now. That is a very important question. There are other questions as well. May they regulate, and to what extent, the cable system? When can they deregulate the rates that they charge to cable subscribers?

I understand—and I have not kept up with it the last several days, but it has been on again off again in attempting to fashion agreement between the municipalities in particular of the States and the industry.

Senator SPECTER. Thank you very much.

Mr. FOWLER. Yes, sir. It is a very good question, sir, and I think it is going to require some congressional attention. There are some things we cannot do.

Senator SPECTER. Thank you.

Senator HATCH. We will turn to Senator Kennedy now.

Senator KENNEDY. Thank you very much, Mr. Chairman. I apologize for not being able to be here at the earlier part of the hearings. We had some other matters. But I am particularly grateful for these hearings. Mr. Fowler, over the period of time that I have been in the Senate I have been very interested in the whole process of deregulation in areas where I thought it made sense, particularly in the areas of economic competition.

As the prime sponsor of airline deregulation and also with the trucking deregulation, we have been very interested and recognize that one of the important aspects of deregulation is entry in the market and then price fluctuation.

One of the things that I think is self-evident here is the enormous cost of these various television stations. It seems to me that we have to be very wary before we change the current situation in trying to anticipate what the major sources of financial strength are going to do if they have the lifting of this old regulation which from my vantage point seems to have worked reasonably well.

I know there is new information, new studies that can support each of the different positions which we are hearing here today, but I am interested in what information, what studies, what evaluations have you done that bring you to the conclusion that the public interests in this area going to be adequately served and that there will not be the kind of change in position of the networks and further increases in concentration that would adversely affect the public interest?

Mr. FOWLER. Senator, thank you for the question. The answer basically is as follows: First of all, we found that there would be some benefits that would accrue to the American people—in this case the viewing public—by relaxing the ownership rules.

Historically, group owners have provided a great amount, typically on the average a greater amount of local news and public affairs programming than have other operators. We found that there were greater economies of scale that would result from relaxing the ownership rules which could provide the basis for fostering competition with the networks. That is to say the——

Senator KENNEDY. You will have a tough time selling that to the people with American Telephone now, with AT&T.

Mr. FOWLER. You remember, during airline deregulation, of which you were one of the most vigorous proponents there were a lot of people who doubted the benefits of deregulation and said tell us, Senator Kennedy and all the others, the benefits. And of course no one can predict all of them, but in that area the benefits have been enormous.

Senator KENNEDY. Well, I do not want to get off into that subject matter, but I will. In airline deregulation, we had already had some very important examples at the local level that we could use to predict the effects of a broad deregulatory policy. You do not have it in this particular case and I am asking what evidence you do have of the benefits of your proposal.

Mr. FOWLER. Senator, the record shows that group owners provide on the average more and better quality local and public affairs programming. This was a solid record that we compiled based upon the present rule of seven. The record showed that there have been some efforts by some of the group owners to engage in ad hoc networking, that is, to attempt to create a fourth television network during prime time to provide a specific program in this case.

For example, Metromedia has been one of the leaders, it provided us with "On Stage America" last year. That was an ad hoc network and that was done by one of the group owners working with other group owners and other independently owned stations. Metromedia was also instrumental in the same way in resurrecting "Fame" after it was dropped by the networks.

We had a record that indicated that the networks, when it came to programming in local markets, like the other group owners, also provided a great amount of local news and local public affairs programming, that they invested a great amount of money, all of the group owners, in newsgathering operations. And all of these benefits based on group ownership, it seems to me, and based upon what our economists told us, could be extended by increasing the number of stations that group owners might so, so that we could bring these benefits to more markets.

Senator KENNEDY. But just on this point, why does it not make sense to permit the ad hoc networks to perform in that way and then have a greater competition between the networks and the ad hoc networks? Why does not that make more sense?

Mr. FOWLER. First of all, we did not find any basis on the record for discriminating against the networks, and under the Administrative Procedure Act we have got to show a harm. We could find none.

The second point, competition is a process and we do not want to skew it one way or the other unless there is some compelling reason. There is no need otherwise, our view is, to put the thumb of the butcher on the scale. It ought to be an effort to foster new competition. Absent a compelling reason to discriminate against the producers in Hollywood or the networks, the agency should not and indeed may not fashion regulations.

The networks are certainly not perfect, and I want to make it clear that I do not apologize for the networks nor do I defend nor do I promote them. I am attempting, and I think all of us are attempting to promote better choices for the viewer.

But there are some efficiencies of networking that we ought not lose sight of. The networks, because of the networking process, were able to bring us the Olympics. They are able to provide on-the-scene coverage of major national and international news events. They cover the conventions. And these latter efforts are typically very costly and loss situations. They do provide great service to the American public.

There are those who see them as being unfair at times, as not getting things right. I have spoken about this on several occasions. I also believe in the first amendment, that it is not the Government's job, no matter how much we abhor what we see, to intervene, to censor. The first amendment says we may not.

I think it is bad policy to discriminate where the rule change does not affect network dominance which comes about as a result of their affiliates, some 200-some affiliates that each network enjoys relations with. If we hold them back, it does not in any way lessen the dominance of the networks because the affiliate relationship is still there. If we permit the networks to acquire stations and provide those benefits of increased news and public affairs programming to local viewers it does not enlarge their dominance on a national basis.

In fact, we found that there were some real benefits to be derived from letting group owners operate stations. They have great expertise and skill and we ought to unleash them. So my philosophy here basically is—and we found on the record, Senator, there's no reason to discriminate.

Senator KENNEDY. Thank you. Thank you, Mr. Chairman. My time is up.

Senator HATCH. Chairman Fowler, we are grateful for you taking time to be here and we appreciate the testimony you have given here today. Thank you for coming.

Mr. FOWLER. Thank you, Senator.

Senator HATCH. Our next witness will be the Honorable J. Paul McGrath, Assistant Attorney General of the United States in charge of the Antitrust Division in the Department of Justice.

Mr. McGrath, we are happy to welcome you to the committee and we look forward to taking your testimony.

STATEMENT OF HON. J. PAUL McGRATH, ASSISTANT ATTORNEY GENERAL, ANTITRUST DIVISION, DEPARTMENT OF JUSTICE

Mr. McGRATH. Thank you very much, Mr. Chairman. My written statement has been presented for the record and I would hope that could be incorporated in the record and that I could just make a few comments, hitting some points that seem to me most significant.

Senator HATCH. Without objection, we will place your complete statement in the record. For the record, I will say we will place all statements in the record. We do appreciate witnesses summarizing so we have more time for questions. Thank you.

Mr. McGRATH. Thank you very much.

First, I would like to indicate how pleased I am to have the opportunity to be here this morning to discuss the views of the Department of Justice on the competitive implications of the FCC's decision to eliminate the seven-station rule may have.

As the committee I believe is aware, before the FCC in their proceeding we presented an analysis of the competitive consequences that might flow from the proposed rule change and we concluded that the proposed rule change would raise little risk of any adverse competitive effects in any market.

Now, I would like to make two points at the outset. The first is that there and here we are commenting only on the competitive consequences. We have not commented on the broader political questions, if you will, of possible effects that the rule change may have on diversity of programming or on other first amendment issues.

And second, I think it is important to note that even if this rule change remains in effect and the sunset occurs in 1990, the FCC is still free and indeed obligated to deny license transfers if there are adverse competitive consequences that would flow from a given transfer; and, second, the Department of Justice, under the antitrust laws, is still free and indeed obligated to sue to block any anticompetitive acquisitions in this industry.

I would like to make just a few points concerning the competitive analysis that we did for this proceeding. I will refer only to our analysis insofar as it related to the ownership of television stations because no significant questions that I am aware of have been raised concerning the ownership of radio stations.

First, the commercial television broadcast market is essentially as a commercial matter a market which involves access to consumers and advertisers essentially buy time on television stations for that access. That is the commercial market we are looking at here.

In doing our analysis, we tried to take the most conservative possible approach, and by that I mean we looked at relevant markets as narrowly as we could. We defined the narrowest possible relevant markets. And I would like to emphasize that the effect of that is if we defined them too narrowly, that tended to exaggerate, rather than to minimize, any anticompetitive consequences that might flow from the elimination of the rule.

Now, in defining markets, first we made the assumption that TV advertising does not directly and significantly compete with other forms of advertising; and, second, in looking at TV, the TV advertising market, we decided there were two separate relevant markets. One, there is a national market, the provision of advertising through networks generally on a nationwide basis; and, second, there is a local spot market, perhaps more correctly there are separate local spot markets for each local television distribution area.

We concluded that the elimination of the 7-station rule and indeed the 12-station rule would not have an adverse effect in either of these relevant markets. On the national basis, the point that we particularly looked at was what would be the competitive consequences if the networks were not barred from acquiring more than seven stations.

We concluded that the competitive consequences were likely to be minimal because it essentially would not change the current competitive situation. Currently, the networks clear or network programs are aired to the tune of about 97 percent during prime time and about 87 percent during daytime. If the rule was changed thus, the networks would remain roughly in the same competitive position in the national advertising market. In local spot markets, we also concluded that the abolition of the seven-station rule would have no effect, and the reason for that was that the Commission's rules concerning cross ownership of local stations would not be changed by the seven-station rule change and thus cross ownership at the local level would be barred. In addition, even if there were not that FCC rule barring cross ownership, we would have serious antitrust problems if, for example, in a market of four or five television stations one of the networks that had an affiliated station there chose to purchase a nonaffiliated station.

Senator HATCH. In your analysis of the FCC, you assume that they would not want to purchase a nonaffiliated station.

Mr. MCGRATH. No, I do not assume they would not want to. I assume that, first of all, the FCC——

Senator HATCH. You assume that the network would only buy an affiliated station.

Mr. MCGRATH. I assume that right now the FCC's rules would prevent the ownership of two stations in a market and that if the FCC's rules did not prevent it, that either the FCC in a given transfer case would bar the acquisition on the basis of anticompetitive effects.

Senator HATCH. You are saying if there is any attempt to purchase nonaffiliated stations, then you would have serious antitrust and anticompetitive problems?

Mr. MCGRATH. We would have very serious antitrust problems, assuming that the network that was making the acquisition had an affiliated station in that market.

Senator HATCH. Yes, whenever they were in a market where there was an affiliate, you would have problems?

Mr. MCGRATH. We would have a serious problem with that, yes, we would.

There are two points that have been made on the economic competition issues that I would like to touch on just briefly. One, it has been suggested that if the networks are permitted to acquire more than seven stations, that that would enhance market power that the networks may have against program producers. And at least on the basis of our analysis we did not see any support for that, any support in this record.

As I mentioned before, the networks already clear over 90 percent of their programs to their affiliates, and it is thus difficult to see how eliminating the seven-station rule and only doing that would change whatever market power they have, if any, over program producers.

Finally, there was a suggestion that if the networks are also released from the obligations of the seven-station rule, that it would be more difficult for others to form independent ad hoc networks. Again, we feel there is no basis for that conclusion, the reason being that the local ownership rules, the duopoly rules and so on would prevent the networks from in effect foreclosing opportunities in local markets through the acquisition of nonaffiliated stations.

Mr. Chairman, those are the main points I wanted to make. The analysis we have done is spelled out in much greater detail in our submission to the FCC which I understand has been submitted to the committee for the record and also it is summarized in the written statement that we submitted yesterday afternoon, and I would be happy to answer any questions that the committee may have.

Senator HATCH. Thank you, Mr. McGrath. The Department of Justice filed comments, as you stated, with the FCC that dealt solely with the issues affecting competition. Now, you have indicated that the Department of Justice did not consider diversity as an issue within its expertise. Is that correct?

Mr. MCGRATH. That is correct. Generally, when we make a filing such as this we limit ourselves to the competitive aspects of a matter. We do it because that is where our expertise is and, second, over the years we have been very effective in getting independent regulatory agencies to listen to our views because they take them as objective. If we start to get into their policy business, then there is a risk that maybe they will not listen to our competitive views.

Senator HATCH. That does not mean that issues of diversity are not important in this area?

Mr. MCGRATH. They are very important, and I think certainly as a private person I have a lot of views on them, but as an official of the Antitrust Division we have not addressed those.

Senator HATCH. What you seem to be saying is that the antitrust laws do not really allow you or permit you to enter into the areas or questions concerning diversity.

Mr. MCGRATH. In the sense that I am using the word "diversity" here, I believe that is correct. The antitrust laws deal solely with economic concerns and questions as to whether changes in rules would result in more news or less news or more sports or less sports are not economic competition questions. They may become such, as, for example, we found out in the NCAA case, where there were restrictions on the provision of a certain kind of football programs to the media. But that was a collateral consequence of some other arrangements.

Senator HATCH. In the comments your department filed, the Department discussed briefly the connection between national advertising markets and national spot markets. I have been led to believe that as network-owned stations proliferate, the total amount of the time available for local advertising of any kind, including national spot advertising, will decrease.

Now, if the networks owned more stations and there is less advertising time available for national spots, does not this tend to lessen the market pressure on national advertising rates charged by networks, and if that is so why does not the Department discuss these possibilities in its comments?

Mr. McGRATH. Well, on the basis of the information that we had, we did not see this as being a problem. The reason is essentially this: The national advertising, if you will, provided nationwide with the network programs fulfills a certain market need. It fulfills the need that certain advertisers have to find that particular market. The spot and local market, the need for that market will still exist, there will still be just as much competition for it, whoever owns the stations, because of the fact that perhaps the same or other advertisers still have an interest in getting into local markets on a different basis, that it is an economic fact that those economic concerns and those economic mandates exist. They are going to exist, whoever owns the television station, and the same kind of pressure for rates is going to exist.

Senator HATCH. In the Department of Justice analysis, however, the Department seemingly assumed that there was no competitive difference between network-owned stations and affiliated stations for purposes of analyzing national advertising competition.

Now, I am led to believe that affiliates sometimes refuse to clear a network program and instead broadcast a syndicated program or some other program, but that network stations never do that. That is what I have been led to believe. If that is so, does that not mean that whether a local station is network owned or network affiliated, it would have an impact on whether the network advertising was carried in that market and therefore the market advertising rate?

Mr. McGRATH. I do not think it would, Senator, for this reason: The fact is that overall network affiliated and owned stations combined clear slightly over 97 percent of prime time programs and slightly over 87 percent of nonprime time programs. Even if you assume—and I do not believe this would really happen—but even if you assume the networks acquired all of their affiliated stations and then cleared 100 percent of their programs, that would not change the figures very much. Those are two pretty big assumptions, in any event, as they assume an enormous investment; and, second, they assume that the networks would decide to show all of their programs in every single area of the country, even if the local viewers were not for some reason likely to be interested in a given program or there was some local program that would make more sense to put on.

The reason I suggest that is not a likely assumption is in each local market the network-owned stations would still have to compete with other stations.

Senator HATCH. Let me just ask one last question. In its recent comments to the Commission, the Justice Department stated that it sees no problems with increased TV ownership by the networks because the television marketplace is not concentrated. Just a few short months ago in your filing with the FCC on the financial interest and syndication rules, the Department said: "The network television industry is highly concentrated and barriers to entry are high," but "the networks are gatekeepers of national broadcast television and that in the context of program supply the Justice Department is not confident that the antitrust laws can be relied upon as the most effective tool for insuring against possible anticompetitive network practices."

Now, can you reconcile these two views and comment on the adequacy of the antitrust laws with regard to the multiple ownership rule context?

Mr. McGRATH. Yes; I think we are looking at two different situations when we go from financial interests and syndication rights and ownership. In the financial interest and syndication rights area, we have indicated that we think it makes a good deal of sense to take more time to study what really might happen if those rules were significantly changed. And the reason for that is the quote that you read indicates that we are dealing really with a different market. We are dealing with a market for programming and we are dealing with a question of whether the networks as such involving, as they do, a substantial portion of the market that puts the programs on the air has too much power, whether a change in those rules would have an adverse impact.

When we are talking about the seven-station rule, we are talking about ownership of individual stations in the context where the networks already have through affiliation the kind of involvement, the kind of vertical involvement they have with individual stations. And the question we were really addressing here was whether a change in the rule that would permit these vertical relationships to move from affiliation, a contractual arrangement, if you will, to ownership would make a competitive difference, and in that context the relevant markets we felt were advertising. In looking at the advertising markets, we concluded that basically there was not such concentration, that there was a problem.

So I think really that the two, those two different rulemaking proceedings, financial interests, and syndication and ownership, present quite different concerns and that is why we have taken different approaches.

Senator HATCH. Senator Biden.

Senator BIDEN. Mr. McGrath, I did not hear the FCC's testimony this morning, but both in its order and I understand its testimony this morning, the FCC cites a variety of efficiencies that might be gained by allowing the rule change to take place. Did the Justice Department find any persuasive evidence along those lines of increased efficiencies?

Mr. McGRATH. We did not, Senator Biden. In our submission to the FCC, we indicated that we did not find any evidence of substantial—that substantial new efficiencies would flow from the elimination of this rule, particularly economies of scale or substantial savings in operating costs or things of that sort.

Now, that is not to say that efficiencies might not be earned if you unrestrict a market and permit a more free flow of assets. The theory under which our economy works is that hopefully there will be more efficiencies, but we did not—we could not conclude on the basis of all the information we had and on the basis of particularly one independent study that we found quite persuasive that we could say we thought substantial efficiencies would flow from the elimination of this rule.

Senator BIDEN. I understand that——

Mr. McGRATH. Economic efficiencies.

Senator BIDEN. Right. I understand that the Rand Corp. did a study and reached a similar conclusion. Did you look at that?

Mr. McGRATH. Well, in some of the conclusions that they reached on the economic efficiency points, scale of economies and so on were at least in part relied on by us in concluding that we could not find efficiencies. To be sure, there may be a case that broader ownership might provide better news programs, or better sports programs, or better programs of some other sort, but I do not characterize those as economic efficiencies.

Senator BIDEN. It is interesting—and would you repeat it again—the fact that on an average day 97 percent of all prime time programming clears in the local markets of the three major networks and at other times the figure is 87 percent.

Mr. McGRATH. That is my understanding.

Senator BIDEN. As a consequence of that, the reasoning goes, as I understand it, that it is already so high, there is such an impact of the networks now, what difference does it make if this rule change takes place.

Mr. McGRATH. No; I——

Senator BIDEN. Am I asking the wrong question? I mean, should we be asking the question why is the clearance rate that high?

Mr. McGRATH. I do not think so, because I think I left out another step of the analysis. We have had network operation roughly of the same kind we now have for a long time. We have had I believe roughly the same percentage of clearance of network programs. No one has suggested any evidence that is at all persuasive that this has led to anticompetitive consequences in the nationwide television advertising. At least, if it has been suggested, that was not laid out in this record and I am not aware of it. So it is not just that we are saying, well, it is already terrible so if it gets a little worse that is not going to be so bad. It is also that we do not see evidence after a number of decades of operation that it is terrible or even a little bit bad from a competitive and economic point of view. The market seems to be working pretty well, in short.

Senator BIDEN. I do not have any further questions.

Senator HATCH. Senator Specter.

Senator SPECTER. I might pick up on Senator Biden's question where he says perhaps we are asking the wrong question, why is it so high, it is 97 percent. I wonder if we are not asking the wrong question in a whole different context, whether the real anticompetitive factor is not in having the networks control so many stations through network affiliation as opposed to the ownership issue.

Mr. McGRATH. Well, I think I would at least in part elaborate on something that I alluded to in my answer to Senator Biden. In looking at the advertising market, looking at the market for television advertising, if there was a substantial competitive problem that flowed from the extensive affiliation of television stations from networks, one would expect it to show up over time, and at least I have not seen any figures that indicate that there is such a competitive problem. It would show up in this way: It would show up through statistically demonstrable rate differences between national advertising and other advertising which were not explained by differences of marginal costs between the two.

Senator **SPECTER**. Mr. McGrath, you are looking just at the advertising and the economic consequences issues. Our hearing today is on the subject as to whether we are going to keep the rule of seven, go to the rule of twelve, or maybe have an unlimited rule in the future, and our question here today is not whether we are going to change network affiliations. I understand that and I do not know that many of us have done very much thinking about this subject at all. Maybe a little thinking on it would be a dangerous thing.

But as I listened to the testimony today on the question of ideas of programming and competition above and beyond the narrower subject of competition for advertising—and I do not think that is nearly as important as the competition for ideas and competition for programming—we really are not limiting the networks' power when we talk about 7 stations owned or 12 stations owned. A network's real power comes into play because of their affiliates. That is where they really have the power and the current system allows them to have affiliates and to dominate the network market. Senator Hatch asked questions earlier about news—sure, there is local news, but the real power of TV in this country today comes from the network news, and I just wonder if—I do not want to broaden the scope of the hearings, but I just raise this consideration with you, picking up on what Senator Biden said about——

Senator **BIDEN**. If the Senator would yield for a second, I think that is really going to end up being one of the big issues.

Senator **HATCH**. Well, I think it should be. That is just what we are talking about, what should be the situation, so I think your question is a good question.

Senator **SPECTER**. So a consequence may be that we will say the networks can own as many stations as they would like but they cannot have as many affiliates. The real question is how many affiliates are networks going to have.

Mr. **McGRATH**. I would suggest——

Senator **SPECTER**. That would be a shocking consequence to come out of this hearing, would it not? They have already formulated the first question.

Mr. **McGRATH**. I saw about 12 $400 suits collapse back there. [Laughter.]

Senator **SPECTER**. I can see as I formulated the first question to you, that Senator Biden thought that I might be on the right track.

Senator **BIDEN**. I am not sure.

Senator **SPECTER**. But I saw a lot of negative signs in the audience that that certainly was an irrelevant, nonthinking question that was being posed.

Mr. **McGRATH**. Well, I would suggest, Senator, that the question of affiliation or ownership, whether there is broad affiliation or broad ownership has relatively little to do with the question you are asking. I think you are absolutely right, that if there is the affiliation, if there is the ownership, you are going to have roughly the same kind of economic consequence either in the narrower sense or the broader sense.

Senator SPECTER. Well, it seems to me that the real power comes with the—that the real power could come either with the ownership or affiliation, but there are so much indicia of power which attaches to affiliation, the network's strength on affiliation gives it tremendous power so that the ownership really becomes much less relevant when we talk about those factors. I am not suggesting that we are about to restructure the networks. I will leave that to Senator Biden on his second round of questioning.

Mr. MCGRATH. Senator, just one comment: I do not know how much power affiliation necessarily gives. The concentration point that you made, that is the affiliation of many stations may result in the same news program being shown many places is not necessarily the result of economic power. It may simply be the result of an attractive arrangement that is made in many places with——

Senator SPECTER. Well, I do not think it is economic power, Mr. McGrath. I think it is political power. I think it is idea power. And I think when you have the network news shows, I think Dan Rather has a lot more power than economic power. And I am not saying it is bad, but I am saying that it is there.

And I pick up on this idea, this question because in your testimony you start off noting that the commission has two bases for adopting its rule originally, the seven rule. First, it believed that national ownership restrictions would promote a diversity of ideas and, second, it believed that these restrictions would prevent anticompetitive control of broadcast stations. The entirety of your testimony has been on the anticompetitive control of broadcast stations, really on the economic line.

Mr. MCGRATH. That is true.

Senator SPECTER. And it may be beyond what the Department of Justice Antitrust Division sees and that you want to talk about, but what about the question of diversity of ideas? You have not expressed yourself on that and I for one would be interested in your view, as to whether moving from 7 to 12 does affect the issue of diversity of ideas.

Mr. MCGRATH. I have not really seen any evidence that it would. Whether you would ever get to the point, if there was tremendously broad ownership or it would, I do not know. I rather doubt it. And the reason I do is that at least from what I have seen the stations that have been owned by groups, including networks, have tended to have a somewhat better record in providing diverse programming, in providing an opportunity for the independent stations to provide more news, more effective news and so on.

The record tends to indicate that joint ownership has been beneficial in that sense and thus I do not think I am scared of it. I do not think I am scared of broader ownership because I do not see any basis for that kind of fear. There is a maxim that competition is universally admired and universally feared, and I think we have to recognize that one aspect of competition sometimes is that the cooperation among various factors in an economy, in this case stations all over the country who have a network affiliation, can produce some real pluses when they are competing for ideas, or money, or whatever with other entities also competing. I think there is a lot to be said for the fact that the networks and the other groups that own multiple stations have quite a good record of diverse programming.

I am not here endorsing everything I see on television, but I am saying at least from what I have seen, I do not see a cause for alarm in that sense.

Senator **Specter**. Mr. McGrath, let me raise a question with you that has been suggested by a number of people, one by Mr. Gerald Udwin, vice president of Group W, on the limitation suggested that the number of TV stations ought to be limited to 25 percent of the national audience. Do you think that such a limitation would make sense from a public policy point of view?

Mr. **McGrath**. I do not really see a good reason for it. If we are talking about 25 percent of the audience on sort of a nationwide basis, I do not see any reason why a given ownership group would be barred from going to other parts of the country to spread whatever programming they were spreading.

From an antitrust point of view, I do not think that kind of rigid rule makes an awful lot of sense, because I do not see a competitive reason why individual groups should not be able to go beyond 25 percent, and I can see some situations where I would have serious trouble with some acquisitions if a group was not up to 25 percent, particularly if the group already had some interest in a television station in a given local market where it was acquiring another interest.

So I am wary of rigid rules. To be sure, in enforcing its statutes, the FCC would want to consider what kinds of guidelines it would want to apply to individual cases involving acquisition of stations, but I would not think a sort of bright line rule of 25 percent is really going to advance the ball very much.

Senator **Hatch**. Senator Wilson.

Senator **Wilson**. Thank you very much, Mr. Chairman.

Mr. McGrath, it seems to me—I have been listening closely and also reading your statement—that your analysis is one that ignores what I think is an obvious and very important connection between programming and advertising rates and therefore the advertising opportunity that is available to advertisers in the local market, not to mention the national market. Do you think that is a fair statement?

Mr. **McGrath**. Well, I am not entirely clear what point you are making, Senator. The fact is in our analysis, in looking at local spot markets, our conclusion was that the competition for advertising in those markets would not be changed at all by this rule change.

Senator **Wilson**. I know that is your conclusion, but I think that it might be useful for you to illustrate how you got there. And, I think that you said your analysis did not seek to take into account questions that have to do with diversity, diversity of programming.

Mr. **McGrath**. That is correct. The analysis that got us there was essentially this: In looking at markets for advertising, we concluded that local markets tend to be separate, relevant markets for this reason: Someone placing advertising generally does not look upon Washington as a substitute for Boston and thus as a general matter in deciding whether to advertise in Washington, the market that the advertiser is looking at is a market consisting of network affiliates and non-network affiliates.

Now, in that market, the factors in that market, the kinds of stations in that market will not be changed by the elimination of the seven-station rule and thus the competition in that market for advertising will not be changed.

Now, if the FCC changed its local ownership rules, that might change the competition for local spot advertising, but the elimination of the seven-station rule should not change it except to the extent, the limited extent that if the elimination of the seven-station rule resulted in the networks acquiring all of their affiliates and thus changing the percent of programs cleared from 90-plus percent to 100 percent, to that limited extent there might be a change. But as I suggested before, that seems to me a rather unlikely scenario.

Senator WILSON. Well, I wonder how unlikely it is. I have been told that the networks would be pleased to go to 1 hour of news but that they are prohibited from doing so simply because the affiliates will not let them, will not agree to more than half an hour. What if the networks hypothetically were to purchase all of their affiliates, what do you think that would produce then?

Mr. MCGRATH. Well, if they purchased all of their affiliates and if the FCC through rulemaking did not place any limitations on them as to what network originated programs could be shown on the affiliates, that might or might not increase the percent of affiliate programming that originated from the networks. The reason it might is perhaps the networks would be in a different position to force those stations to take the programming.

Senator WILSON. I think they would be in a very different position.

Mr. MCGRATH. On the other hand, however, you have to recognize that each of those stations, each of those local stations, if owned by the networks, would then provide to the networks a totally different kind of economic concern. They want to make money on each of those stations which they have now got an investment in, they are competing against other local stations, and simply to put on those stations anything they please is something that might well redound to their economic detriment in terms of the profit or loss from the individual local station.

So I do not think it is at all obvious that if the networks owned many more stations, that the experience would be different. Now, if it were, if over time it became clear that economic competitive problems were threatened as ownership expanded, then the FCC and the Department of Justice on a case-by-case basis can deal with that, the FCC under the Federal Communications Act, as they are mandated to do by several court cases, and the Department of Justice under the Clayton Act, or if there were an extreme situation, and particularly if it involved collusion under the Sherman Act.

So I agree that there are possible goblins in the closet, but they can be dealt with.

Senator WILSON. Well, I am buoyed by your optimism, but I confess that I do not share it. I would have to say that I think what you are promising is due diligence on the part of your department and your division to engage in a lengthy and highly uncertain legal process to lock the barn door after the horse has been stolen, and I do not think that is a very good thing for this U.S. Senate to advocate.

I would suggest to you that if there had not been either a financial interest and syndication rule or the 7–7–7 rule which concerns us today, we would not have seen the kind of remarkable growth in the number of independents which has far outpaced the population growth in this Nation.

I think that your analysis is deficient in that it does not take into account the connection between programming and advertising rates and advertising opportunity. I would refer you, if you have not yet looked at it, to the testimony, the very eloquent testimony, that was submitted by the Association of National Advertisers to the FCC, I believe in February of last year—I would be happy to provide that to you. The point that it makes is that in those markets where there is competition between the independents and the networks, either owned and operated affiliates, there is a remarkable difference in the rate card. And I would also suggest to you that if you were to allow not only unlimited growth in the ownership by the networks, but even what was proposed by the Commission, a 12–12–12 rule, you would have had a backdoor situation where the networks could create a network within a network and do exactly by indirection what they have been prevented by Congress from doing directly. This would effectively be an abrogation of the financial interest and syndication rules, and that would have precisely the effect which the ANA feared when it testified before the FCC about the advantages of maintaining the rule to their advertisers.

Mr. McGRATH. Our analysis of the figures, Senator, was different. We did not think the case was made out, that the experiences were so different and therefore did not conclude that there was empirical evidence of a competitive problem.

Senator WILSON. Well, I think it is interesting that ANA, which is in the business, after all, of serving their advertisers, serving themselves, since it consists of both agencies and advertisers, found a 20- to 60-percent rate card advantage in those markets where there was a competition, and the fact that your analysis did not find that candidly makes me suspicious of your analysis.

Mr. McGRATH. No, that is not what I said. I did not say there was different experience in different markets. I said that we did not see, on the basis of all the figures that we saw, any basis for concluding that a change from affiliation to ownership would make any difference, that there was any indication that the experience indicated a competitive problem in that sense.

Second, in looking at markets you look at the figures, a wide variety of factors tend to influence the rates in different markets, including, among other things, the number of stations competing for business and the strength of those stations in given markets and one can conclude different things on the basis of all those figures. All I can tell you is what we conclude.

Senator WILSON. Mr. Chairman, I have exceeded my time, so I will conclude.

Senator HATCH. That is fine, Senator Wilson. Let me just ask one other question of you, Mr. McGrath. I am led to understand that the Department of Justice's calculations under the Herfindahl-Hirschman Index take into account only network ownership of stations and not network control through affiliates and affiliation. What would the HHI Index be if you counted all the affiliates as owned by the networks?

Mr. McGRATH. Senator, I do not know the precise answer to that question. I would prefer to give you that numerical calculation in writing, if I could.

Senator HATCH. OK.

Senator WILSON. Mr. Chairman, I would be grateful to have the opportunity to submit some questions in writing.

Senator HATCH. Well, we will keep the record open for all witnesses so that anybody on the committee, including Senator Wilson, can submit any questions they desire. As I understand it, Justice calculates the index based on the number of stations, and another question I would ask you is why would they not calculate it based on the control over the national advertising market, that is, audience shares and/or ad time sold on owned or affiliated stations? I think these HHI problems have to be answered, too, so I will submit those to you in writing. We do appreciate your time here and the testimony you have brought.

Mr. McGRATH. Thank you very much, Senator.

Senator WILSON. Thank you, Mr. McGrath.

[Prepared statement follows:]

Department of Justice

STATEMENT

OF

J. PAUL MCGRATH
ASSISTANT ATTORNEY GENERAL
ANTITRUST DIVISION

BEFORE THE

COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

CONCERNING

PROPOSED ELIMINATION OF THE
FEDERAL COMMUNICATIONS COMMISSION'S
SEVEN-STATION RULE

ON

SEPTEMBER 11, 1984

Mr. Chairman and Members of the Committee:

I appreciate this opportunity to present the views of the Department of Justice on the competitive implications of the Federal Communication Commission's recent order eliminating the "seven-station rule." These regulations, which have been in effect for several decades, have prevented any firm or person from owning more than seven AM radio stations, seven FM radio stations or seven television stations. The Commission had two bases for adopting these rules. First, it believed that national ownership restrictions would promote a diversity of ideas. Second, it believed that these restrictions would prevent anticompetitive control of broadcast stations.

Recently, after receiving extensive comments from various parties, including the Department of Justice, the Commission decided that these rationales for the rule were no longer valid. Thus, it adopted a transitional scheme for radio and television ownership that would permit a person to own no more than twelve stations in each broadcast service until 1990. If no adverse results had become apparent by then, the twelve station cap would be lifted.

The Commission's decision has been criticized. While some critics argue that the present seven-station limitation should remain untouched, others have argued that a twelve-station rule is as arbitrary as a seven-station rule. These critics contend that any transition should be based on some empirical measurement, such as the maximum aggregate audience that could be reached by a group owner. Apparently as a result of this criticism, the FCC has delayed the effective date of its order as it applies to television station ownership until April 1, 1985, in order to study further whether some modification of that decision is necessary.

The Department's comments to the FCC dealt solely with the competitive basis for the rule. A copy of those comments has been submitted for the record. Based on the information before the FCC and as a result of our own analysis, we concluded that, while the benefits of competition are as important in radio and television braodcasting as in any other industry, elimination of the seven-station rule would not raise any apparent risk of adverse competitive effect in any relevant market. I would like to explain briefly the competitive analysis that led to our conclusion. Since the critics of the Commission's order do not seriously oppose its application to radio, I will limit my remarks to television station ownership. 1/

To assess the competitive effects of eliminating the seven-station rule, it is necessary to define the relevant markets in which any effects would be observed and the degree of concentration in those markets. Most people tend to think that the product of commercial television is the presentation of programming to viewers. In economic terms, however, the product of commercial television is access to program viewers, and this product is sold to advertisers, with rates charged to advertisers being based on the number of people expected to be watching at the time the advertisement is aired. Accordingly, our competitive analysis focused on whether increased ownership of stations would adversely affect competition for the sale of advertising in any relevant market.

In analyzing advertising markets, the Department assumed the narrowest markets possible. This was the most conservative approach to the current problem because, the more narrow the relevant market, the more pronounced any competitive problems would appear to be. For example, as a starting point, we assumed that television advertising does not compete with other forms of advertising. Obviously, to the extent that this assumption is not valid, the relevant market would be broader and any possible adverse competitive effects that might be threatened by a rule change would be less apparent.

1/ I will also not address the issue whether the interim twelve-station rule should be replaced with a less arbitrary rule based, for example, on percentage of audience reached by owned stations. While the twelve-station rule is as arbitrary as the seven-station rule, one might doubt the utility of devising a more complex formula for the short interim period contemplated.

Next, we found that television adverstising consists of two markets. First, advertising is delivered on a national basis through networks. Second, so-called "local spot" advertising can be targeted to local audiences and sold by local broadcast stations. Advertisers generally do not view various local broadcast markets within the nation as sbustitutes for each other. Thus, when looking at spot advertising each locality is a separate geographic market.

Based on our analysis, we concluded that elimination of the FCC's seven-station rule would have no adverse effect in either the national or local spot advertising markets. In the worst case, assume the national broadcast advertising market has only three major sellers -- the three broadcast networks -- and is thus highly concentrated. Elimination of the seven-station rule would not affect any power those firms may have in that market. While networks might vertically integrate further by purchasing additional stations, any such acquisitions should not materially change concentration in the national advertising market, since the networks now clear over 90% of their programming through contractual arrangements with their affiliates. Thus, a change in the number of stations owned by a network would probably have only a minimal impact on the relative advertising share of that network. If the seven-station rule were changed, all three networks would continue to compete nationally, either through network-owned stations or through independently-owned affiliates, and thus the form of the relationship between the network and the stations should not affect the national advertising market.

I should also note that some advocates of repealing the seven-station rule believe that unrestricted ownership would enhance competition for national advertising by providing a way for group owners to network first run programming. The Department is dubious such a substantial benefit to competition would result. First, the current spectrum allocation scheme would prevent a fourth broadcast network from reaching more than 65% of all U.S. households. Second, new networks would continue to face a "technical" limitation by having to rely heavily on less preferred UHF affiliations.

Our analysis also led us to conclude that spot advertising sold in local geographic markets should likewise be unaffected by eliminating the existing seven-station ownership restrictions. First, the Commission's local ownership rules would continue to prevent a single entity from owning more than one television station, radio station or newspaper in any local market. Second, the antitrust laws would prohibit any acquisition by a network of a non-affiliated station that significantly threatened competition in a local market. Thus, the Commisson's seven-station rule currently plays no role in preventing concentration in local markets, and it is not needed to protect healthy local competition.

I would like to address two concerns raised by critics of the proposed rule change that should not be used to deter the FCC's deregulatory initiative.

First, based on our analysis, we also concluded that repeal of the seven-station rule would not make it more difficult for non-network broadcasters to assemble ad hoc or informal networks of sufficient size to promote new video programming, thus foreclosing competitive benefits that might result from additional station ownership by non-network group station owners. Even after repeal of the seven-station rule, the local broadcast cross-ownership rules would continue to prevent a significant reduction in the number of non-network stations available for distributing programs. Thus, in the extreme case, even if each network acquired ownership of each of its affiliates, the number of unaffiliated stations available for other "networks" would not be decreased (especially since acquisition of non-affiliated stations in markets where networks already have affiliated stations would raise serious antitrust questions).

Second, some have expressed concern that network acquisitions of local stations may enable the networks to exercise market power against program producers. Repeal of the seven-station rule, however, should not adversely affect the program acquisition market, especially since network affiliates already air more than 90% of network offerings. In fact, if common ownership of larger groups of stations were permitted, that should increase competition for network quality programming. In this regard, I note that five non-network group owners, Gannett, Hearst, Metromedia, Storer and Taft, representing 32 television stations that reach 45 per cent of the viewing public, have recently announced their intention to finance jointly the production of network quality programming that will run for the first time on their stations. 2/ As for syndicated programs sold on an individual station-by-station basis, the markets are local. Thus, the prices syndicators receive from each market would continue to be set by competition among the stations in each such market. Because the seven-station rule does not affect local concentration, local programming sales should be unaffected by its repeal.

2/ "5 TV Station Groups to Produce Programs," New York Times, Sept. 6, 1984, at C-20.

Senator Hatch. We will now call on Mr. Jack Valenti, who is president of the Motion Picture Association of America, whose office is here in Washington, DC, Mr. Valenti, we will be happy to take your testimony at this time.

STATEMENT OF JACK VALENTI, PRESIDENT, MOTION PICTURE ASSOCIATION OF AMERICA, INC.

Mr. Valenti. If you do not mind, I would like to stand. Early this morning in exhibiting my awesome American twist serve, I almost broke my back.

Senator Hatch. We will be happy to have you stand.

Mr. Valenti. I am going to limit my remarks to about 6 or 7 minutes, a restraint that I find to be almost cruel and unusual punishment. But I have other information and I hope that you will force me to reveal it before I am done. But I would like to cut through the arguments and the counterarguments and get back to the basic questions which confront this committee and which at no time in the testimony I have heard by the Chairman of the FCC did he ever answer.

The first question is: Is it in the public interest that three national networks increasingly concentrate in their hands control over local and national television, both entertainment and news? That question was never answered and it has not been answered today.

Two, how does the public benefit from extending the reach and the power of three corporate entities over television, the most pervasive influence in our society? We are not talking about strapping steel. We are not talking about asparagus. We are talking about television. And as you, and Senator Specter, and other Senators said, no society, or republic, or democracy is going to be durable unless it protects its body of diversity of ideas. That is what television is all about.

And, third, if the public does not benefit and if the public interest may be soiled by this grant of extended power to the networks, if it may be soiled, then why give it? Why do it? Why take the chance? We are talking about Herfindahl, and Hirschman, and Heimlich maneuvers and all the other things that I have heard here, but we have not really gotten down to the real world of ideas, communication, persuasion, conviction, how people get their information, and what they do with it. That is the grit, and the soul, and the spirit of a democratic society, and within the embrace of that question, it seems to me, lies the crucial decision by this Congress in dealing with the most powerful force in this land, which is television communication.

Now, as Senator Wilson said, deregulation is a wholesome concept. Most of us are for it. But in television, deregulation means something radically different from what it means in grocery stores, or trucking, or airlines, or anything else. In television, deregulation means the networks get more power, more stations, which means less competition in the marketplace. But to hold restrictions in place, Mr. Chairman, gives nonnetwork group owners and others a chance to create a competitive counterforce to the networks.

Now, at no point, it seems to me, in its report and order—and I went through this dense thicket of 40 pages of prose—at no point did this report and order take imperative note of network domination. It always laughed it off and said—for example, there are 30,000 sources of ideas so if one network buys a television station there are only 29,999 sources of ideas. It is just so ludicrous as to not even require mention.

Today the networks control 100 percent of national prime time television. Today the networks control 100 percent of all nationally delivered television news, morning and evening. CNN, which is the most energetic competitor to the networks, unhappily is only in about 23 million homes. Some 70 million people every night watch the three evening news shows. Senator Specter is right: The anchormen have more power than you do. More than 125 million to 150 million people a day watch television. That power is just too scary to allow it to be further concentrated, more than it is now, in just three corporate hands.

Today the networks, control a substantial portion of daytime television. Today the networks, through their affiliates, control what Americans see and do not see in prime time television and on daytime television. And while Chairman Fowler said how many more television stations there are in this country, he neglected to tell you that 74 percent of all commercial television stations in this country today are affiliates. Today if you are an independent producer and you do not gain the approval of one of three gatekeepers, you are forever exiled from prime time entertainment television, and every professional in the business knows it.

How does the public benefit from a gift of further power to three corporate entities so they can own and operate more television stations in this country, when we know that the more owned and operated stations there are, the less competition there is, the less incentive there is, the less possibility there is for nonnetwork owners to compete. No matter how benignly managed these networks are—and I say a cliche when I say some of my best friends are network executives—but no matter how benignly managed they are——

Senator HATCH. They may not be anymore—I am not too sure.

Mr. VALENTI. The potential for danger, that key phrase, the potential for danger exists, therefore, both in entertainment and news. Dominion over television, with more network owned and operated stations, carries with it—no matter what anybody tells you—in the real world, it carries with it the power to set advertising rates, to wrap an acquisitive arm around independent programmers, to make it impossible for competitors, nonnetwork group owners to diminish network domination, and it allows networks to gain more preeminence in news, local as well as national.

Please understand, networks are different from group owners, the point that Mr. Fowler refused to concede, they are very different. They are a different kind of animal. Group owners are not networks. They do not have affiliates. They do not command morning and evening news. They do not command daytime programming.

More importantly, group owners are the only entities extant today that have even the possibility of a competitive counterforce to the networks. Network owned and operated stations never, never, never preempt a network program which is owned by their parent for some independent program. And by the way, Chairman

Fowler is talking about "Nicholas Nickleby." It was brought to life by Mobil Oil, not Metromedia. Nonetheless, they had one hell of a time trying to place that program.

Network-owned-and-operated stations never preempt but affiliates sometimes do, and I can cite you specifics later about that. The only way you can create anything resembling a counterforce is through these ad hoc networks.

I am almost done. I am prepared to offer you, if you want, some facts and statistics which give the lie to the FCC's report that free television is in danger of being blown away by the so-called new media. Nothing could be farther from the truth.

There are answers and they are simple and they are readily accessible if the FCC would just heed a plea for commonsense and wise judgment over this most powerful force. By the way, Chairman Fowler, without knowing it, made this case for me.

One, keep the current restrictions on the networks as they exist today. No. 2, allow a relaxation of the rule which lets non-network group owners acquire more stations within some kind of a reasonable reach, Senator Denton, that reasonable people could agree on. Third, allow further reach of U.S. TV households by nonnetwork group owners by purchase of stations with substantial minority interests. Fourth, and most importantly, do not sunset these restrictions on the networks as they exist ever, ever, ever.

Thank you very much, Mr. Chairman.

Senator HATCH. Thank you very much, Mr. Valenti. Could you explain how permitting the networks to buy more stations increases diversity and competition?

Mr. VALENTI. Because, Mr. Chairman, if you are going to have any kind of ad hoc networking—let us start with the real world again—you have to have network affiliates preempt and networks O and O's never preempt. So if there are 15 network O and O's now and then you have, say, 30 or 35 or 40 all in the largest markets where you must have it if you are going to have an ad hoc network, the ad hoc network crumbles.

Let us take the "Jesse Owens Story," a fine made-for-TV movie which was recently produced by Paramount Pictures in the summer of 1984, this year. They went into an ad hoc network. They went into 155 of the 210 markets in this country. They got 113 affiliates to preempt. They got 43 independent stations and they were able to penetrate about 155 or 150 markets, which is the minimum you need if you are going to have national advertising.

If they had to erase 30 or 40 or 15 to 20 of those affiliates who are now network owned and operated, the possibilities of that ad hoc networking being formed would have collapsed because it is the large markets that you must go into. You cannot have 155 markets all in the lower part, you have got to have some of the bigger markets, too. That is the principal reason why.

And the second reason is I do not believe it is in the long-term best interests of this country to have 30 to 40 of the largest, most powerful television stations in the world all under the governing thumb of three people. I mean I do not think that St. Paul returning from Damascus ought to have that kind of power.

I think you need to be careful, to be wary, to be cautious in the disposal of power. Our Founding Fathers said the better it is dispersed, the better it is for this country, Senator Denton. As long as you keep power on a short tether it is seldom fatal to the people. It is when you allow it to grow in a kind of increasing little by little by little, and one day you wake up and you are off the Herfindahl-Hirschman-Heimlich maneuver index and you do not know where you are. [Laughter.]

You cannot turn back the clock. Senator Denton asked a very good question. Once you have it in place and when these stations are protected by the first amendment, which by the way has lasted a lot longer than 31 years and has done very well by this country, you cannot turn them off simply because they have got too many stations. You have allowed them already to gain that kind of power.

I just say it is better to err on the side of caution than it is on the side of giving more power.

Senator HATCH. Do you agree with Mr. Fowler's assertion that there is a sufficient abundance of mass media available to Americans to ensure adequate diversity in viewpoints and should we permit concentrating some of this diversity and how would that serve the first amendment goals that concern Members of Congress and other people throughout this country?

Mr. VALENTI. There are a lot of things that I disagree with in the FCC report, but none more violently than that. Let me show a chart which has to do with the Roper organization. It did a study that showed where people get their news.

The Roper organization showed that between 1959 and 1982 there was a significant change, that television went from 51 percent of where people most got their news to 65, an increase of 14 percent. Newspapers went from 57 to 44, minus 13; radio, 34 to 18, minus 16; and magazines, 8 to 6. That is a 27-percent drop.

I think this is crucial. If you are a public official and you know darned good and well that you can be on the front page of every newspaper in the country, you can write op-ed articles and they disappear almost without a trace, nobody ever mentions it to you. But you get on for 30 seconds on a news program and everybody says, "Senator, I saw you on television last night." They do not say, "I saw your op-ed piece in the New York Times," or the Los Angeles Times or the Salt Lake paper or whatever. But with television they do. It is because of its all-embracing, all-encompassing feel for this country, and no one can gainsay that. And anybody that tells you that this is not a piece of the real world is simply shrouding the truth.

Senator HATCH. Thank you. We will turn to Senator Denton.

Senator DENTON. You brought up the question, Mr. Valenti, of quality programming indirectly when you mentioned "Nicholas Nickleby" and the "Jesse Owens Story."

Until now we have been talking about competition but your illusions raised the spectre of the effect on quality of programming or content which has not before been mentioned.

I, for one am interested in the quality of programming both with respect to objectivity of news and to the so-called entertainment media in the manner in which it either promotes the general welfare and domestic tranquillity or does not. As a Senator, I feel obligated to raise that issue. It has been raised by liberals who are friends of mine. Morton Kondracke has said about your industry that ". . . it might help, too, if President Reagan would speak to his friends in Hollywood about the extent to which they have oversexed American society." Those are Morton Kondracke's words, not mine.

Eunice Shriver has helped me on some programs. Senator Kennedy has helped me on some initiatives in the Senate which have been misportrayed by much of the media. In fact, the impression is given that some of the bills that I have been in favor of have not been passed. One major bill that became law during the 97th Congress was the bill to establish the Adolescent Family Life Program. The bill was unanimously approved by this committee, led by the chairman and supported by Senators Metzenbaum and Kennedy.

I believe we are hypocrites if we do not think about the content of programming. Many liberals, as well as the conservatives, Democrat and Republican, will say that the content of certain programming is contributing to a malaise in this country that has something to do with the deterioration of the family in the United States.

I am concerned about the FCC, in the name of deregulation, relinquishing the responsibility for maintaining, any kind of governmental standards in program content. If we are to promote the general welfare and ensure domestic tranquillity, your industry must somehow have some sense of responsibility and manifest that in your own standards. We used to have such standards to some degree in both the movie and television industries. They are disappearing.

According to reports I have received, if all Federal regulation of program content is abolished, some major networks will move in the direction of more sexually explicit programming. We thought that cable television would improve the overall content of television programming. Unfortunately, much of cable television content is moving in the opposite direction. So we have got the "blue movie" trend. Is it good for us? I do not think that moving in this direction is in the public interest. It is especially bad for our children.

I think this is a serious problem and I want to hear some kind of conscientious reflection of your views about this.

I believe as Americans, and as ethical human beings, we need to come to grips with this question of what effect we are having on our own society by what we are transmitting as entertainment and news. What do you think would be the thrust in terms of content of programming if the FCC's proposal was to be implemented? I really chose this time to satisfy my own conscience and to express my concern about television content. I do not like the way it is going.

I think PG movies today, in many cases, are worse than the X-rated movies because they inaccurately depict matters of human sexuality which misleads our children.

Mr. VALENTI. Well, Senator, I think the points you make are quite bipartisan in nature. I do not think they have anything to do with political ideology because a lot of people share those. I share them myself. My favorite movie is "A Man for All Seasons," which today would be rated G. I happen to think it is a wonderful movie, not because it is a G movie but because it is marvelous entertainment.

The quality of entertainment is a subjective gauge. When the networks are forced each night into fierce competition for ratings, they may make some decisions which you or I may not agree with, but I am not too sure if I were sitting in the shoes of Mr. Tinker or Mr. Grant or Mr. Thermopoulos, that I would not be making the same decisions they make. I am not for one moment going to suggest that I would not, because it is a tough, hard business and if you do not get ratings you do not win.

It also says something though about the temper and the spirit of the American people, that you have to put such stuff on the screen before people will watch it. I happen to believe, along with Grant Tinker, that it is possible to put quality programming on the air, and if you keep it consistently quality and you stay with it, that after a time you will draw a sufficient number of people to care about that to make it economically viable.

Now, beyond that, Senator, you get into the whole first amendment process when you talk to creative people. They have a right to say what they choose as you have a right to tell me what I should write or what I should do. The only right I have is I do not have to watch it and I do not have to read it. That is my right and that is what I always suggest to people who talk to me about movies they do not like I say the best way for you to get better movies that you like is do not patronize the one that you do not like.

That is the best I can give you, Senator. It is an ungainly response to a solid argument that you make, but I would be less than honest if I told you that I had found a Nirvana, for you and for me both.

Senator **Denton**. I do not suggest, and I would not suggest that you put me up as someone who would be able to dictate, were I given the power, that which is advisable and inadvisable in news or entertainment media. Senator Specter, as chairman of the Subcommittee on Juvenile Justice, with my participation, has studied the child pornography issue. There is no question about the contribution of television and movies to a propensity for unhappiness today. Suicide is the second rated cause of death among teenagers. You are talking about do you want to see it. I do not believe that the matter of choice is the only issue that should be addressed.

I believe that you cannot be entirely libertarian and keep the society alive, although I believe in libertarianism generally. I admit that it is a tough question. I am just saying we are not producing that which we are worthy of producing and required to produce if we are going to insure domestic tranquillity and promote the general welfare. I will stick with that.

Mr. **Valenti**. I will make one further comment and that is I think as a parent of young children who are now 15, 18, and 20, but 4, 5, 7 years ago my wife was very, very stern and very strict with their movie-going habits and their television viewing habits. So I think a lot of this depends on parental responsibility. If parents do care and do not abandon that responsibility, then perhaps what you and I and others would like to see might be more prevalent.

Senator HATCH. Senator Wilson?

Senator WILSON. Thank you, Mr. Chairman.

Mr. Valenti, when Mr. McGrath was before us, I asked him a question that I am going to put to you. Do you think that there is a connection between the expanded opportunity for ownership that would have been granted by the FCC's proposed 12-12-12 rule and the nature of the programming that would result, and do you think that there is a connection between programming generally and the rate and availability of advertising to local advertisers?

Mr. VALENTI. Senator, I am familiar with the Association of National Advertisers' survey and I have discussed it at some length with their officials and I believe in it. I happen to believe that not only in television but in every environment, every area of our life, the more competition there is, the better it is for the people, that prices will be lower and quality will be higher. The more you allow a few people, a few entities, to get enormous power over whatever industry they inhabit, I do not think that is good for the people. I think sooner or later you are going to find several surly facts emerging: One, advertising rates are going to go up. If somebody can control rates, they will, and two, you circumvent, you deter the emergence of competitive programming. The Supreme Court, in its famous case on Associated Press, I think in 1975, said diverse and antagonistic forces are what are needed not only in a republic but in a competitive society.

Any time that you diminish or shrink the opportunity for other people to come in and compete with the networks, I think you diminish quality in the long run. That is just a subjective judgment of mine, but I know that it happens and anybody who tells you that letting the networks buy more owned and operated stations is going to have some munificent public benefit I think is just whistling past a graveyard. It does not make any sense and it collides with the intent of the FCC to give more competition.

Senator WILSON. Thank you.

Senator HATCH. Thank you, Mr. Valenti. We appreciate having you here.

I am wondering how our court reporter is holding up here. Do you want to take a short break?

COURT REPORTER. I am fine.

[Prepared statement follows:]

TESTIMONY OF JACK VALENTI, PRESIDENT
Motion Picture Association of America, Inc.
Before the Judiciary Committee of the United States Senate
September 11, 1984

* * *

Is it in the public interest for three national networks to increasingly concentrate in their hands control of local and national television?

How does the public benefit from extending the reach and power of three corporate entities over television, the most pervasive influence in our society?

If the public does not benefit and if the public interest may be soiled by this grant of expanded network power, then why give it?

* * *

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An Introductory Comment

My name is Jack Valenti. I am President and Chief Executive Officer of the Motion Picture Association of America.

I am here today representing a group of organizations which are part of The Committee Against Network Dominance, a coalition whose objective is to offer facts and reason why the three national networks should not be allowed to grow larger.

I want to commend this Committee for so speedily organizing a hearing to deal with the Federal Communications Commission decision to dismantle a 31-year restriction on expansion of network power to own and operate more television stations.

The possibilities of harm to the public interest are readily apparent. The fact this Committee acted swiftly to examine and weigh the anti-trust and monopoly aspects of the FCC Report and Order of August 3, 1984 is most commendable.

In the paper that follows, we will show why the public interest is not served by the FCC action; why the networks today are the inheritors and possessors of enormous power over the nation's most influential political and entertainment medium; why the word "deregulation" in the television marketplace means less competition whereas in other areas it means the opposite (that fact has to be clearly understood by all for most of us are very much for deregulation when it opens up a market and encourages competition); why the Congress should be wary, cautious and ever vigilant so that no few private corporations gain domination over national and local television news and entertainment; why diversity and competition in TV can only be served by allowing competitors to the networks to be able to expand their capacities while holding the networks to their current reach.

The organizations listed below are supportive of the Committee Against Network Dominance. Some of these organizations have not reviewed either specific recommendations made in this testimony or the basic material included, but are firmly in agreement with the theme of opposing network dominance and the necessity for not allowing networks to gain more power through an increase in their owned-and-operated stations:

The Nine Member Companies of
Motion Picture Association of America, Inc.

and

MTM Productions

LORIMAR Productions

Viacom International, Inc.

Victory Television

Hill/Mandelker Films

Caucus of Producers, Writers and Directors

Action for Children's Television

Association of Independent Video and Filmmakers

Hispanic Telecommunications Network

Media Access Project

National Association of Independent
Television Producers & Distributors

National Association for Better Broadcasting

Public Media Center

Telecommunications Research and Action Center

Consumer Federation of America

American Federation of State, County & Municipal Employees

League of United Latin American Citizens

Mestizo Productions Associates

There is but one Issue before this committee and it is a daunting one: **Should this nation allow three powerful national networks (ABC, CBS, NBC) to increasingly concentrate in their hands control of television in the United States?**

From that issue comes the Question which the FCC has never answered and which it must answer if its grant of expanded power to the networks is to gain any credence.

The Question is this: **How does the public benefit from the expansion of more power to the three networks through the enlargement of the number of their owned-and-operated stations?**

That is The Issue and that is The Question. The time has surely come to confront them, so that congressional judgments can be made that will prevent three corporate groups from gathering even more concentrated power over the single most pervasive force in the nation.

This is a matter that appropriately draws the attention of the Congress. When a person is elected to the Congress, he or she is introduced to deeper obligations that only those chosen by balloting of their fellow citizens are held accountable.

There is a line from Goethe which best illuminates the fix we are in as a result of the FCC action and what has to be done: "The truth must be repeated again and again because error is constantly being preached around us."

So, let us now see why this Issue and this Question are so important and why the Congress and this committee must never allow domination of television to be placed in the hands of three large corporations.

In the next pages, we will deal with the following section headings:

I. How the Monopoly of Three Networks was formed and why it is impregnable to assaults. Page 4

II. The Concentration of Network Power and how that power is exercised through affiliated stations, owned-and-operated stations, networking apparatus, control of prime-time and daytime programming and control of nationally delivered news, morning and evening. (in the trade, network owned-and-operated stations are called "O & O's") Page 9

III. Why group owners (like Metromedia, Taft, Capital Cities, etc.) cannot form a nightly "fourth network" but can offer some competition to the networks in creating "ad hoc" networks. If the networks acquire more O & O's, the chances shrink for "ad hoc" networking. Page 18

IV. Why "free television" is in no danger of being destroyed by pay cable and other pay services, as the FCC Chairman insists. Page 21

V. How huge profits generated by the networks from their owned-and-operated stations and their networking apparatus give them fiscal resources exponentially larger than all their competitors combined. Page 26

VI. How the FCC's action diminishes Diversity of voices in the marketplace and stunts competition to the networks. Page 28

VII. Why the acquisition of more owned-and-operated stations by the networks could give them an unseemly and potentially dangerous grip over national, local news and over political choice. Page 34

VIII. Our recommendations for a reasonable resolution of this issue in the larger interests of the public and the American viewing family. Page 39

EXHIBIT I: How group owners could increase their owned stations to a total of 12 VHF stations in the larger markets and stay well within the limits of 22% of all TV households. Page 41

EXHIBIT II: Graphic evidence that VHF stations achieve higher ratings than UHF stations, bearing out the fact that UHF operates, as Commissioner Mimi Dawson wrote, "at a technical and economic disadvantage." Page 43

I. THE MAKING OF A MONOPOLY or how three networks gained control of national television.

It is ironic that the the current three-network domination of national television sprang from a lack of foresight by well-meaning members of the FCC in past years.

An addendum to this document contains an excerpt from a most revelatory book by A. Frank Reel, former president of Metromedia Producers Corporation, entitled "THE NETWORKS: How They Stole The Show." It will give you the full flavor of the history which brought about the current immutable three-network stranglehold on national television.

In 1953 the Federal Communications Commission decided there should be a limit on how many televison stations assigned to scarce VHF channels any corporate entity or person could own. They put that limit at five. It was then and it is now a very wise, limiting rule. In 1954 in order to encourage the spread of UHF stations, the FCC relaxed the rule a bit, extending the limit to seven stations, provided that no more than five stations could be VHF.

But the essential mischief had already been done, which was sealing in concrete the fact that there would never be more than THREE national commercial networks in this country.

Because the networks were formed early in television's national life, they built and bought stations in the biggest of U.S. markets. Networks in the very early years of televison (1941-1958) gained control of their fifteen VHF owned-and-operated stations and built up their affiliated networks. Some 75% of all current network affiliate stations were on board and in place before 1958.

This is the lineup of network owned-and-operated stations:

CURRENT NETWORK OWNED AND OPERATED STATIONS

	Market	% of U.S. TV Households	Rank
ABC	New York	7.704	1
	Los Angeles	5.204	2
	Chicago	3.500	3
	San Francisco	2.420	5
	Detroit	1.950	7
	Total	20.778	
CBS	New York	7.704	1
	Los Angeles	5.204	2
	Chicago	3.500	3
	Philadelphia	2.879	4
	St. Louis	1.231	18
	Total	20.518	
NBC	New York	7.704	1
	Los Angeles	5.204	2
	Chicago	3.500	3
	Washington	1.793	8
	Cleveland	1.662	10
	Total	19.863	

And here is an illustration of where they could go to if the FCC action stands as the rule:

POSSIBLE ADDITIONAL NETWORK OWNED AND OPERATED STATIONS

	Market	% of U.S. TV Households	Rank
ABC	Philadelphia	2.879	4
	Boston	2.323	6
	Washington	1.793	8
	Dallas/Ft.Worth	1.719	9
	Cleveland	1.662	10
	Houston	1.640	11
	Pittsburgh	1.430	12
	Total 7 stations	13.446	
	Total 12 stations	34.224	
CBS	San Francisco	2.420	5
	Boston	2.323	6
	Detroit	1.950	7
	Washington	1.793	8
	Dallas/Ft. Worth	1.719	9

	Cleveland	1.662	10
	Houston	1.640	11
	Total 7 stations	13.507	
	Total 12 stations	34.025	
NBC	Philadelphia	2.879	4
	San Francisco	2.420	5
	Boston	2.323	6
	Detroit	1.950	7
	Dallas/Ft. Worth	1.719	9
	Houston	1.640	11
	Pittsburgh	1.430	12
	Total 7 stations	14.361	
	Total 12 stations	34.224	

II. THE CONCENTRATION OF NETWORK POWER and the exercise of that power by three large corporations.

The prime issue is concentration of network power. How many stations one owns is not nearly so crucial to the public interest as how many people those stations can reach, impress, influence and persuade.

Or to put it in the logic of FCC Commissioner Mimi Dawson, who said (writing in her dissent to the majority judgment dismantling the 7-7-7 Rule) that the FCC decision "continues to equate a TV station in New York City, the nation's largest market, with a TV station in Glendive, Montana, the nation's smallest."

That is the heart of the matter: concentration of power through more network owned-and-operated stations reaching large numbers of viewers, in addition to their affiliated stations.

Consider now the networks' enormous power, and whose appetite for more power is never going to be sated since dominion over the television marketplace brings with it the parallel power to set advertising rates*; to wrap an acquisitive hand around the neck of creative programmers; to make it impossible for competitive forces to diminish network dominance; and silently, unaccountably, the footfall making little echo, to intrude on the political consciousness of the nation by their accretion of more and more owned-and-operated stations to block competition by group owners and others, and to gather more preeminence in news programming in local markets as well as national programming. The potential for these dangers is clear and present. It is that potential peril to which this Committee must direct its concern.

Examine this catalogue of current network power:

1. Networks have affiliations with 624 TV stations in every market in the country. This represents 74% of all 838 commercial TV stations in the land.

This total includes 61 "specialty" stations: 49 "religious" broadcasters and 12 "Spanish language" broadcasters. There are 303 non-commercial stations operating today, and 153 independent commercial stations not affiliated with networks.

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* A survey of the Association of National Advertisers revealed in those markets where there was no strong independent TV station, advertising rates were 20-60% higher than markets where strong independents existed.

Some statisticians put the affiliate number higher but that is because in 42 markets there are only one or two commercial TV stations available and one station may be affiliated with two or all three networks.

More than half of an affiliate's daily broadcast schedule is filled with network-originated programs. By contract they are bound to the network, receive compensation from the network, and can "preempt" (that is, not show a network program in favor of some independently produced program) only at their own jeopardy for repeated preemption can be a spur to the network cancelling the affiliate connection. Since affiliated stations achieve higher ratings than non-affiliated stations, it is a valuable cachet a station cannot afford to lose.

A key point: Affiliated stations will "preempt" (although infrequently) because it is in their financial interest to do so (they earn more since they keep all the advertising revenues). But it is never in the financial interest of network owned-and-operated stations to "preempt" since it is their network program which would be preempted.

2. As a result of affiliate contractual relationships, the three networks today:

* Control the major portion of daytime television. Many of the popular "soap operas" are owned and controlled by the three networks, and through this proprietary tie have a tight grip on the lucrative daytime programming hours. Daytime is critical to the networks because as Forbes Magazine said (August 13, 1984) "that's where the money is." In 1983, for example, ABC made 55% of its network profit from daytime.

* Through their contractual relationship with major league baseball, professional football in both the National Football League and the United States Football League, professional basketball, tennis and golf, the networks have a lock on sports most people want to watch.

* Control 100% of all national primetime programs. If you as a program producer want to be in primetime nationally with a series of programs or a "special", you have to strike a deal with one of the three networks. Absent that approval, you are virtually locked out of national primetime. The only alternative is the "ad hoc" network constructed by group owners and/or independent programmers and syndicators.

You are not so exiled in other creative endeavors. If you want to make a movie and every studio in the country turns you down, you can entice your own investors, produce your movie and take it yourself to individual theaters or theater circuits to get play dates. No major motion picture studio owns any theaters in the U.S. so theater owners are independent businessmen who make their own decisions about what they exhibit.

If you choose to write a book and every publisher in the nation turns you down, you can have your book published at your own expense and go directly to the book retailers to find a market for it.

Only in national primetime television are you totally barred with no durable alternate entryway if the three networks say "NO."

* The networks control 100% of all nationally delivered news, morning and evening. Cable News Network[*] is the only energetic competitor to the networks, but CNN has less than 1/3 the potential coverage of the networks. CNN is available today in 26 million cable homes as contrasted to 83 million TV households all of which can receive network news, and do.

Consider for a moment the possible hazard in political choice if the networks were allowed to own-and-operate five or seven more powerful VHF-band TV stations.

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[*] INTV is another independent news service, which distributes news programs to independent TV stations but whose circulation is much less than CNN.

With seven more stations, as we have demonstrated, the networks can "reach" at least 35% of all TV households directly over-the-air. With the extension of cable, that "reach" may be expanded to 40%-45% of all TV households. Remember, that is the "reach" of each network through its owned-and-operated stations.

Even at 25% reach of U.S. television households through their owned stations, the networks will have expanded their power significantly and, in the public interest, unwholesomely.

Lest we forget, we are examining an embrace not only of entertainment programs, but of news, both local and national.

Is that prospect in the public interest?

Today there are some 61 million copies of daily newspapers delivered to homes or sold in the streets to the American public. Yet, other than the Wall Street JOURNAL, and to a lesser extent, USA Today, there is no newspaper that circulates throughout the country. The JOURNAL'S circulation is 2,081,995 and USA Today has a circulation of 1,332,974.

Would the nation feel anxiety if two or three publishers each owned publications with a daily circulation of 30-35 million or a combined circulation of 90-100 million?

Yet that is precisely the situation in television which is, as the evidence markedly demonstrates, a far more powerful and persuasive influence on the American public than any other communications medium.

It is not enough safety margin to merely recite what the networks have done with their O & O's in the past. The dicey issue is whether it is sound and wise public policy to permit any three corporate powers to be able to impose their will and their opinion, which they can do if they wish, on one-third to one-half of American households. That is a potential danger which no Congress or President can tolerate even in its most benign state. The danger becomes less remote and more accessible given the passion of the FCC to unbuckle all restrictions and regulatory safeguards on every phase of television. Who will stand guard when the sentries are dismissed and the alarms are silenced?

But there is another troubling truth.

Anyone can begin publishing a newspaper if one has sufficient capital. You do not need a government approved license to make that move.

The situation in television today is dramatically different from the newspaper business or motion picture industry or book publishing business. A July 24, 1984, FCC report on "Television Channel Utilization" reveals that there are no "vacant" VHF channels available for commercial stations within 55 miles of the major community in any of the "top 94" markets in this country. No more. None. (It is not likely to start a "gold rush," but there are three "vacant" VHF channels within 55 miles of the "title" community in the "lower 48" states. There is one in Vermillion, South Dakota, assigned to Sioux Falls, market #95. And there is one in market #206, Helena, Montana. The third is in the nation's smallest market - the one cited by Commissioner Dawson - Glendive, Montana, #210.)

All three networks have owned-and-operated VHF stations in Chicago, the third largest market in the country. There are only four VHF stations in Chicago. That is all there will ever be. The networks have wrapped up this third largest market. Those who would like to take them on in open and free competition are physically prevented from doing so. The only way is to buy the one independent VHF voice in Chicago. After one competitor has made that move, all others are turned away at the gate.

There are UHF stations to be bought in Chicago. But it is not simply a coincidence that the networks own no UHF's. Why? Because VHF offers better home reception and as Commissioner Dawson wrote, "UHF continues to operate at a technical and economic disadvantage." (page 5, Commissioner Dawson's dissenting opinion)

In the top seven markets three have no independent VHF station and two have only one independent VHF station each. New York and Los Angeles have seven independent VHF stations between them.

III. Why Cannot 'Group Owners' Like Metromedia, Cox roadcasting, etc. Buy More Stations and Construct a "Fourth Network"?

The reason why that is not possible can, again, be traced to the "table of allocations."

In order to construct and maintain a "fourth" network, which would be fruitful competition to the three networks, you must be able to invade at least the top 150 (out of 210) U.S. markets in order to reach 95% of the nation's TV households. Networks are "national distributors", attracting national advertisers. You cannot offer real competition to the networks if you operate regionally, and you cannot do that for the same reason you cannot achieve it nationally.

Here is why:

Of the 210 markets in the U.S., 94 have no more than three commercial TV stations. That means there is no alternative non-network resource to carry your programs in almost half the markets on any sustained basis if you aim to construct a fourth network.

Even on an "ad hoc" basis, it is difficult to patch together a network to carry an independently produced program in primetime. But "ad hoc" networks are the only competitive counter force to absolute network dominance.

Take "THE JESSE OWENS STORY", for example. This is a well-made television movie produced by Paramount and offered as an alternative to network primetime programming in the summer of 1984.

Paramount was able to entice only three affiliates (of 30 affiliates) in the top ten markets to "preempt" for the Paramount program. ("Preempt" means not carrying the network-delivered program in that time slot and showing instead "THE JESSE OWENS STORY"). Not one single network owned-and-operated station would take the show, which was not surprising since network owned-and-operated stations NEVER preempt a primetime network program, ever. Diversity is devastated. Competition is stunted.

Paramount was able to convince 113 affiliates (out of 624) to preempt for "THE JESSE OWENS STORY" which, added to their forty-two independents, allowed them to enter 155 markets.

This was for just one program. It would be impossible to make this arrangement every night. Network affiliates might "preempt" networks in primetime once or twice or maybe three times a year, but only the boldest and most secure have the courage to preempt regularly. It is a large risk they take when they display that kind of independence.

Moreover, if a newcomer to the scene attempted to form a network, in the face of these insurmountable obstacles, to program nationally in every market just one night a week would require a programming investment of $125 million. And where would the advertisers come from to recoup that investment? The station line-up available would be a shaky coalition to say the least. It would be a mix of VHF and UHF, and of the latter, many of them would be the fourth or fifth ranking station in key markets, an uncongenial fact known to every advertiser's media buyer. Alas, the reason why this has never been done and is so hard to do on a regular basis is now painfully clear.

The reasonable alternative is the "ad hoc" network, and that requires a "hold" on any increase in network owned stations.

Therefore, the objective, stated by the FCC, and the action they took simply don't coincide. What they did makes no sense. There is no connection between a goal of increased group owner competition to networks, and the largesse of extended power to the networks.

The networks wanted to take prime access time for news however. They wanted to take that other half hour for their news from the local stations' time because they are a bunch of greedy pigs. But if they want to run their news in prime time, they can do that and nobody would argue with that. The affiliates have all said they would be happy to clear it.

Senator HATCH. Now, you have indicated you have had a very difficult time competing with them with regard to sporting events as well because they out-bid you each time.

Mr. TURNER. They absolutely can. Their power, their market power is just—well awesome. Nobody else has even tried to compete with them, even Metromedia and these little ad hoc program networks. In that same article Mr. Erlick talked about, Bob Bennett, the president of Metromedia, said these programs that we are talking about doing, one-half hour situation comedy, are not even designed for prime time. They simply are not going to go into competition with the networks in prime time. I am the only Don Quixote around here that has been willing to even try and I have been punching them for the last 8 years and what I have got to show for it but skinned knuckles. I am still doing it.

Senator HATCH. Could you comment on the benefits of the market reach approach like we have been talking about here, perhaps combined with a numerical limitation specifically?

Mr. TURNER. I think that the current limitations give them as much power as they could possibly ask for. I could not believe it when Mark Fowler at the FCC proposed this deregulation and threw this hot potato in your lap. Of course, he proposed to do away with the other rules, too. I mean it is not deregulating just to help monopolies. It is not going to create any new distribution entries. That is the thing about this deregulation. I mean you are the only thing that can save us from that Federal Communications Commission that we have got now. Their deregulation it is very much only for the big guys and not for the people of this country.

Senator HATCH. Senator Denton?

Senator DENTON. In your presentation you discussed something that I think is a factor. This country is a country of a free enterprise system. It is also a country of survival, of civilization and the need for a strong national defense. Our Nation needs a perspective on those issues and I have derived the impression that your network gives considerably more sense of responsibility to that which is coming across on the news.

As the owner of that network, have you had anything to do with that policy? Can the other networks get their act together?

Mr. TURNER. Absolutely, they could, Senator, if they chose to do so. For instance, I have a former president of CBS working for me. Several years ago he went into the then president of CBS's office, Bob Wood—the man I am talking about is Bob Wussler, he was vice president. He had just reviewed Mannix and Kojak, which were two of the most violent programs ever to run on network television and he said, "Mr. Wood, I have to go on record in opposition to the programs you are putting on this fall. We are going too far. They use over-the-air television to take these programs into the homes of the American people." And Bob Wood, the president of CBS at the time looked at him sadly and said, "Wussler, let me tell you something, I leave my conscience outside in the morning when I walk through the doors of CBS at 9 o'clock."

The chief executive officer of one of these three networks—I cannot say which one—told me in a meeting that we had within the last 4 months, "Turner, you criticize our sleazey programming all the time, but I want you to know that in our private lives a lot of us network executives are moral outstanding people." I said, "Wonderful, but that does not fly." I said, "That is what the Nazi's said at Nuremberg."

They could put on decent programming, but they just want the almighty dollar. You have to remember that free enterprise includes selling drugs to high school kids. It just happens to be against the law. Unfortunately, because of the first amendment and because all of us want not to be involved in censorship, we have let these people put in the homes of the American people a lot of programming that should not be there. It is violent. It is stupid. It is sex-filled. It is just plain simple trash and everybody knows it.

You can talk about the Olympics. It is pretty hard to screw the Olympics up. ABC did not produce it. The Olympic Committee did. All they did was film it, which is easy, just like the Super Bowl. Anybody can take some cameras and put them at an athletic event and hire a couple of rum-dum announcers to call the play by play. We do it all the time. [Laughter.]

Like ABC brings you the Olympics? My foot. Anybody can televise the Olympics. It is no big deal. They just out-bid everybody else with their market power. I mean they did not bring us the Olympics. The Olympics would have taken place, and did take place before ABC televised them, and they will take place if ABC is not televising them. They have nothing to do with it.

Senator DENTON. I would like the record to show that I did not want to go through censorship approach. I had a program to enlist advertisers to be more responsible about the way that they passed out their money to the networks. That was almost a success, but it failed because the groups I had organized were afraid they were going to lose their 501(3)(c) if they went ahead with it. It would have worked.

But at the moment of desparation I went to an executive vice president of a major network, whose name I shall not mention, and to him for about 3 hours. He said, "I agree with every word you said. I am going back and tell my president and my chairman of the board this and I am going to write you a letter and tell you what happened."

He told me I would have a response in 3 days. A week went by, 10 days went by, and I started figuring out what was happening. He had made his pitch and perhaps wrote the letter, but the lawyers got ahold of it. But the man broke on his own integrity on the matter, just as you are implying. They know what they are doing and they cannot get themselves out of it in many cases. This is one.

So I want the record to show that. I have had that experience. I have been involved with this since 1973 when I got back from Vietnam, with no progress except the dawn of more networks, more stations, more proliferation. People are OK if you just get enough people involved. Power tends to corrupt and that applies to us and to the media. I would just like to see more diversification and I think you are part of that. I have to acknowledge some admiration for what you have been able to do and I think there will be others like you who will be able to increase diversification. I think that is a factor in the legislation that Senator Hatch has cosponsored.

Senator HATCH. Mr. Turner, I want to compliment you, too. I know it is tough to break into this field and that is one of the things that bothers me, because I do think that economic concentration can be proven here. I do think that the share of the advertising dollar could be proven. I think there are a lot of things that need to be reassessed in this particular area.

But even more important, I think one of the major considerations we have to make is just the control of the thought processes in this country and the viewer processes of this country and the concentration of control in those areas. Now, that bothers a lot of Senators here who are not willing to speak up on it.

Mr. TURNER. Do not let them have any more stations than they now own and operate. Keep the rules the way they are. They have not earned greater power than they already have. They already have almost total power over this Nation today.

Senator HATCH. Well, there are a lot of people who agree with you and whether that is true or not we will just have to see. I have to admit, I am greatly concerned about it, other Senators are concerned. I think both sides of the floor are, by the way.

Mr. TURNER. Absolutely. You know, I have been around here for a long time. This is one area that liberals, conservatives, Democrats, and Republicans agree about, and everybody is afraid. What "60 Minutes" did to John Connally when he was running for President, they literally crucified him. I mean they finished him off, a dead pigeon in one 15- or 20-minute episode. They have the power to destroy the President of the United States in a day's time if they wish to do so, and you cannot give them more power. They all work together. They had one representative here. They all start at the same time in the morning. They all run their news at exactly the same time. They all start prime time. They all cut back their convention coverage from full coverage to two hours at exactly the same time. Gentlemen, they compare notes with each other. They are not competitive. They are an oligopoly or whatever you want to call it. The three of them are all in it together and all three of them make a profit. Usually the loser loses in a competitive market, but not with that gang. There is plenty of money to spread around amongst the three so nobody looks too bad. They are all headquartered in New York and they are cattycorner from each other and they switch executives back and forth. I mean they pay the same thing for programming, they pay their presidents the same thing. They are not competitive.

Senator HATCH. Thank you very much, Mr. Turner.

Mr. TURNER. Thank you, gentlemen.

[The following was received for the record:]

TESTIMONY
R.E. TURNER, III
CHAIRMAN OF THE BOARD AND PRESIDENT
OF
TURNER BROADCASTING SYSTEM, INC.

SEPTEMBER 11, 1984

Good Morning, Mr. Chairman and Members of the Committee. Thank you for permitting me to address you on one of the most critical issues affecting competition and information diversity in the television marketplace today. The FCC's decision in the Seven Station Rule puts into the hands of three entities -- ABC, CBS and NBC -- the unprecedented potential to dominate the programming and information Americans will receive in the years ahead. It permits as well a significant increase in station ownership by other large media conglomerates at the expense of independently owned station operations.

Let us not underestimate the significance of these consequences. The networks are not only the gatekeepers of the television entertainment we watch; they control the news most Americans rely on and so mold our perceptions of the world around us. Acquisition of additional stations by the networks will not only increase their power in the distribution of national news, it will eliminate presently independent voices in the distribution of local news in the communities of the acquired stations. This result is antithetical to bedrock constitutional and communications policy: that the widespread dissemination of news, information and entertainment programming from diverse and antagonistic sources is essential to an informed public and democratic government.

When most people think of Turner Broadcasting, they probably think of Cable News Network and the Superstation --

WTBS. What many do not know is that TBS also owns Turner Program Services, a subsidiary devoted to the production and syndication of television programming. Recent and successful production efforts have included Amazon, a $6.5 million special produced by Jacques Cousteau, Portrait of America, a 50-part series exploring each of the United States, Our Finite World, a series on world population and resource conservation issues, and The World of Audobon, a series covering numerous environmental issues.

Additionally, TPS distributes CNN Headline News to over 130 television stations -- independents as well as network affiliates. CNN Headline News represents a significant and increasingly important alternative voice to network news.

Small program distributors, like TBS, may distribute their programs to television stations on either a cash or "barter" basis. A barter deal provides an economically efficient program distribution alternative in which the station receives the program free in exchange for airing national advertising sold by the distributor.

The networks vigorously oppose barter syndication. Their interests are obvious: when a network affiliate clears our program, it may refuse a network program for the same time period. For example, the president of the CBS Television Network has been quoted as saying that the independent TV station is CBS' biggest competitor and that network affiliates that accept bartered programs actually support independent stations. The networks correctly view as direct competitive threats the ad hoc independent networks that distribute bartered programs. [See "Networks Attack Barter Syndication," Electronic Media, Feb. 16, 1984, at 1, 26, (copy attached)]..

The development of competitive sources of TV programming was precisely the stated goal of the Seven Station Rule when it was adopted over 30 years ago. Yet, by allowing the networks to more than double the number of VHF stations they can own and operate, and eventually removing ownership limits altogether, the FCC in one stroke may have effectively eliminated the growth of and even the existence of such independent program networks.

The reason is plain to see: to the extent that a network owns the station, it controls directly and totally all programming decisions. The networks view the denial of access to their O & Os and to their affiliates as a critical weapon in their competitive battle against independent TV stations and independent producers/distributors. Thus, the network O & O has every incentive to carry a network show over an independent production, even when the latter would bring in higher station revenues. The networks also try to pressure their affiliates to clear all network programming, although affiliates often carry independent programs when the ratings/profits are likely to be higher.

It is no wonder, then, that Turner Program Services, which on an occasional basis sells independent programming, has never cleared a program on a network O & O, even though the same program has been aired by network affiliates. For example, in 1982, TPS syndicated the Georgetown-Virginia basketball game which was 65-70 percent cleared by network affiliates. No O & Os carried the game. TPS' biggest self-produced program, Cousteau/Amazon, is currently sold to 35-45 percent of the network affiliates but has not been sold to a single O & O. Other independent distributors face comparable problems.

If the barter system continues to grow, the networks may well move to purchase some of their affiliates because every network acquisition is one fewer station available to TPS and other independent syndicators/producers for the creation of ad hoc networks. The FCC's Decision permits the networks each to acquire up to seven more VHF stations in the nation's largest markets within the next six years and an unlimited amount thereafter.

Moreover, the FCC's decision doesn't prohibit network acquisition of unaffiliated, independent stations in their affiliate markets. It merely says it will "scrutinize" such acquisitions, and that it "doubts" that they will be approved. However, nothing in the decision binds this Commission, or more importantly, any future Commission to execute this policy. Of course, any independent station acquired by a network will reduce the number of outlets available to competitive networks.

In addition, if a network were to own an independent station and have an affiliate in the same market, independent producers/syndicators would be doubly foreclosed. In these markets, the network would be able to "control" its affiliate from clearing independent programming with the continuous threat to switch its network programming to its own "independent" stations.

Perhaps most important, the financial viability of ad hoc networking is dependent on clearance of the program in about 80-90 percent of television households. This is because national advertisers require a program to be cleared in the vast majority of television households in the country before they will support it. Denial of station access in even a few markets can preclude the origination and distribution of such programming.

Each network's O & Os currently reach about 50 million people, or about 20 percent of all television homes. Any increase in network ownership of television stations, particularly VHF stations (which have technical advantages over

UHF stations) in the larger TV markets, can foreclose access to ad hoc national networks. Thus, merely by increasing their audience penetration by buying additional large market stations, the networks can significantly hinder production of independently produced programming.

The FCC asserts that this increase in owned and operated stations would not significantly extend the reach of the networks, because affiliates already carry a complete lineup of network programming. In fact, the FCC's own figures show that there are significant differences between the network programming clearance rates of affiliates and owned and operated stations which suggest that further acquisitions by the networks would deprive the public of large amounts of independently produced programming. Affiliates clear about 97 percent of the networks' prime time schedules compared to 99 percent for O & Os; the clearance percentages for daytime feed are about 87 percent for affiliates and 96 percent for O & Os. Thus, if each network were to acquire an affiliate in a major market, up to 69 hours of prime time programming and 995 hours of daytime programming per year that affiliates currently acquire from independent sources would be displaced by network programming in that market. [See Network Inquiry Special Staff, Federal Communications Commission, New Television Networks: Entry, Jurisdiction, Ownership and Regulation (Oct. 1980), Vol. II at 197-98, 260-68 ("FCC Network Inquiry").]

If, as can be expected, each of the networks purchases its affiliated stations in the largest available television markets, the population covered by network O & Os would rise by 60 to 70 percent, to about 37 percent of the viewing public. [See 1984 Television & Cable Factbook, at 1; U.S. Department of Commerce, State and Metropolitan Area Data Book, 1982.] Over thirty million additional viewers would be deprived of the many hours of independent programming that affiliates in those markets otherwise would have aired. And, because affiliated stations in smaller markets clear significantly more network programs than stations in larger ones [see FCC Network Inquiry, Vol. II at 263-65], the programming losses cited above probably understate the foreclosure effect of network acquisitions in major markets.

Finally, by using a 12-station base in large markets, the networks can produce and amortize the cost of first run syndication by reaching over one-third of the nation through their own stations, and sell all syndication rights to a "friendly" syndicator. By this method, the networks would have the ability to overwhelm independent producers and totally dominate first run syndication.

If the networks are given the opportunity, you know they will try to dominate the programming markets as they already dominate the broadcasting industry. Their slavery to ratings, to profits and to the bottom line, is absolute. The networks struggle to come in first in a pathetic battle to appeal to the lowest common denominator. Even third place among three giants is still an incredibly powerful and profitable position. But do they take time out from their ratings war to exercise a sufficient sense of public responsibility; to give just a little bit back to society; to offer quality informational programming or programming for children?

The networks have an enormous potential to help shape children's lives in their formative years. This is the power to communicate positive value systems and positive role models; a power, unfortunately, that the networks all too often have failed to use constructively .

They do not deserve to be rewarded with more power; they haven't responsibly exercised that which they have. At the very least, we should not give them the power to destroy the fledgling alternatives that are developing to counteract their influence.

The adverse public interest effects of the FCC's decision are not limited to an expansion of network power. The flip side of expanding ownership limits is a corresponding reduction in independent local ownership -- long viewed as the best guarantor of high quality local service. Local owners, as members of the communities they serve, are more familiar with and responsive to local needs and interests than absentee owners. Local owners must frequently serve community needs irrespective of short term financial consequences. The managers of absentee corporate owners have no sense of community identity and in any event are bound by fiduciary duties to maximize profits.

The FCC's decision permits increased acquisition of independent stations by media conglomerates, like Metromedia, Capital Cities, and Taft Broadcasting, as well as by the networks. Reduction in the benefits of local ownership will be the inevitable consequence. Today, there are only a couple of independently owned stations in the largest twenty markets. Under this rule, there will be few locally owned stations and independent voices in the top forty markets in but a few years. The local TV station, like the local newspaper, will become an anachronism in the U.S.

Although this nation's foundation rests on the First Amendment principle of encouraging a diversity of information sources, we now stand at the brink of letting the networks and group owners completely take over and dominate the most powerful information sources ever devised by humankind. Even Japan, a country lacking our First-Amendment heritage, has an official policy restricting undue concentration of media ownership to prevent monopolization of information. Rather than raising our limits from 7 to 12 stations, we should reduce them from 7 to 3 stations in order to maximize information diversity.

The FCC's abandonment of the Seven Station Rule will result in a poorly informed public and thus tears at the very fabric of our democratic society. Congress must seize the opportunity to preserve this fabric that the FCC has callously begun to shred.

In conclusion, the effect of the FCC's rule change will be to reduce competition in the production and distribution of independently produced television programming. This in turn will reduce the diversity of programming and information available to the public -- whose interests the FCC is charged with protecting. If the FCC will not protect the public interest, who will? Surely not the networks or the large group owners. I urge the Congress to remind the FCC of its duty and correct this abdication of its responsibilities.

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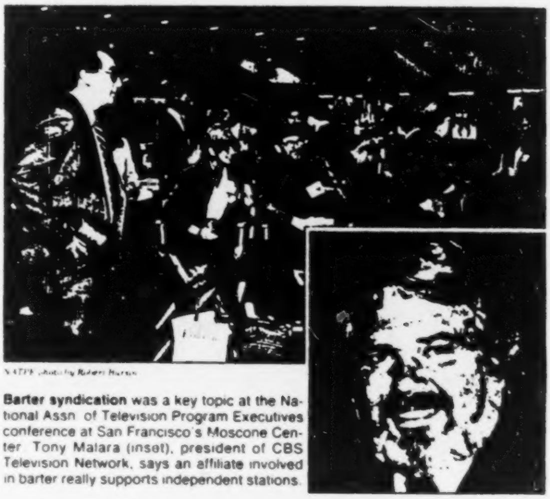
ELECTRONIC MEDIA

February 16, 1984



NATPE photo by Robert [illegible]

Barter syndication was a key topic at the National Assn. of Television Program Executives conference at San Francisco's Moscone Center. Tony Malara (inset), president of CBS Television Network, says an affiliate involved in barter really supports independent stations.

Networks attack barter syndication

By BOB MARICH

SAN FRANCISCO—The time when barter syndication was beneath the notice of the major broadcast networks apparently has ended.

At the convention of the National Assn. of Television Program Executives here, the networks lobbied against barter.

Still barter continued to roll. Warner-Lambert Co., a major package goods advertiser, made a $9 million upfront buy of barter syndication programs through Lexington Broadcast Services.

The deal is unusual because Warner-Lambert is not simply co-sponsoring a single program. Instead, the advertiser is buying time in several barter programs during all dayparts.

Barter is a form of distribution in which a tv station receives a program free in exchange for airing national commercials within the program. Barter advertising increased to $500 million last year, according to LBS, compared with the $8 billion in national spots on the three networks (EM, Feb. 9).

The CBS Television Network was the most aggressive in badmouthing barter at the NATPE conference, several barter syndicators said.

Tony Malara, president of the network, said in an interview that his network's affiliate relations executives for six months have been making formal presentations to affiliates outlining CBS' concerns with barter.

"The independent tv station is our biggest competitor," Mr. Malara said.

He said a network affiliate that gets involved in a barter system really supports independent tv stations.

George Newi, vp-general man-

(Continued on Page 26)

Tv networks attack barter

(Continued from Page 1)

ager of the ABC-TV Network, told affiliates during his network's meeting here that barter advertising is a big problem for both the network and affiliates.

NBC officials, led by Pier Mapes, network president, reminded their affiliates that the network takes all the financial risks and that ad hoc networks are a big threat.

At least one barter syndicator is planning a counterattack.

Henry Siegel, chairman of LBS, is going to mount a trade ad campaign, the thrust of which will suggest that the three tv networks themselves are barter vehicles. #

Senator Hatch. Let us now go to our last panel. Prof. Harvey Levin, of Hofstra University, Long Island, NY. He had a private commitment so we will place his statement in the record.

Mr. James Winston, who is president of the National Association of Black Owned Broadcasters, in Washington, DC, also had a prior commitment because of the length of this hearing and he would like his statement placed in the record as well.

[The following were received for the record:]

STATEMENT OF

HARVEY J. LEVIN

Professor of Economics

Hofstra University

Before the Judiciary Committee of the United States Senate

September 11, 1984

RECISSION OF THE GROUP OWNERSHIP RULES
A CRITIQUE OF THE FCC'S REPORT AND ORDER IN DOCKET 83-1009

BIOGRAPHY
HARVEY J. LEVIN

The writer is Weller Professor of Economics and director of the Public Policy Workshop, Hofstra University, and Senior Research Associate, Center for Policy Research, New York and Washington, D.C. He is author of FACT AND FANCY IN TELEVISION REGULATION (Russell Sage Foundation and Basic Books Inc., 1980), THE INVISIBLE RESOURCE (Johns Hopkins Press, 1971), and numerous scholarly papers on public policies towards television broadcasting and the radio spectrum resource.

Among other organizations, he has been a consultant on communications, economics and policy issues to the Office of Technology Assessment of the U.S. Congress, the General Accounting Office, the Committee for Economic Development, the Department of Justice/Antitrust Division, and the Federal Trade Commission/Bureau of Economics.

Dr. Levin's research has been supported in part by the National Science Foundation, 1984-85, 1973-78, 1970-72, Russell Sage Foundation, 1978-79, and Resources for the Future, 1980-82, 1964-69. He was Visiting Scholar at Stanford University/Hoover Institution, Summers, 1982-84, and at the Center for Strategic and International Studies of Georgetown University, 1982-84. Earlier, he was Carnegie Fellow in Law and Economics at Harvard University, 1963-64, and Brookings National Research Professor in Economics, 1959-60.

The FCC Report and Order in Docket 83-1009 proposes to terminate the Seven Station Rule Proceeding by raising the existing ceiling on multiple station ownership from 7 television, 7 FM, and 7 AM radio stations, to 12 stations in each case. Furthermore, this is conceived as a "transitional limitation" only, to expire six years hence, "unless experience shows that continued Commission involvement is warranted." The Report further states that "[t]he Commission will continue to scrutinize each individual acquisition to assure itself that the acquisition does not contravene any of the Commission's public policy concerns, particularly those related to diversity and competition." (Report & Order, para. 5).

Then, at para. 9, the Report notes that the present Seven Station Rule "may have been based in large degree upon false assumption," at least insofar as the alleged "monolithic editorial viewpoint" imposed by group owners on their stations are concerned. "Statistical evidence adduced in ... this proceeding," the Commission continues, "set out more fully at para. 45-47 below shows that group owners broadcast more issue-oriented programming than non-group owned stations (emphasis added) (Report, para. 9)." And most important, the Report states that because of this "plus" in furthering the diversity of ideas through issue-oriented programming, "it may be said that group ownership actually furthers, rather than frustrates, the foremost First Amendment goal of augmenting popular discussion of important public issues." These benefits of group ownership, the Commission concludes, "provide an important basis for our decision to eliminate the Rule." (para. 9)

In commenting additionally on its original goal in adopting the Seven Station Rule in 1948, the Report again underscores that "the fundamental purpose of its new national ownership rules was both 'to promote diversification of ownership in order to maximize diversification of program and service view-points', and to 'prevent any undue concentration of economic power contrary to the public interest.' These two theories — the need for diversity of programming and editorial viewpoints, and the need to ensure that no competitive harm occurs — are the two explicit rationales for the Commission's Seven Station Rule." (para. 17)

Of special import, also, is the assertion that "the Commission adopted the rule on the basis of prognostication, not empirical proof, and relied on assumptions which at the time were untestable. That the Seven Station Rule promotes or is integral to genuine diversity in the expression of viewpoints, and prevents anticompetitive activity, was assumed, but this assumption was not based on hard evidence in the record." (para. 20)

In para. 19, the FCC cites a Supreme Court decision, as follows: "[i]f time and changing circumstances reveal that the 'public interest' is not served by application of the Regulations, it must be assumed (that) the Commission will act in accordance with its statutory obligations." The FCC now believes "that changed circumstances, as well as new information bearing on the purposes and effects of the rule, now justify its repeal." (para. 19)

My comments will mainly focus on program composition and diversity, and secondly, on some economic issues the Commission also cites to justify its proposed repeal of the Seven Station Rule. Briefly, I have reviewed the Commission's factual findings and the assumptions from which it concludes that the Seven Station Rule should be replaced for a six-year interim period by a Twelve Station Rule after which all restrictions on station ownership would be eliminated . My standard of appraisal is grounded on my own independent analysis and empirical assessment of the present rule, as well as of a still larger number of important policy issues.[1]

I do not offer these results here as any "last word" on such complex and hotly contested issues. However, an action with as far ranging consequences as the FCC's recent decision to drop the Seven Station Rule should not be based on faulty factual or analytical premises. Nor does the fact that "no better" or "more complete" evidence was transmitted by the parties justify an action of this magnitude, without the Commission first discharging its affirmative public interest responsibilities to generate such evidence.

1. A Summary Critique of Selected Deficiencies in the Current Commission Report

Illustrative of what is now needed in the above mentioned problem areas are systematic studies to rectify a number of serious deficiencies:

(1) The Commission failed to clarify or even make explicit its own concept of "diversity," at best left vague and ambiguous even though far more specific conceptualization was possible.

(2) The Commission cites an unscientific, unreliable and widely criticized study by Litwin and Wroth - which, in an earlier proceeding, it had itself discounted and rejected.

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[1] See H. Levin, FACT AND FANCY IN TELEVISION REGULATION, Russell Sage Foundation, 1980.

(3) In its references to ratings data for local news programming, the Commission confuses the goal of market efficiency and that of program quality in terms of critical standards of journalistic, artistic, and electorate-informing merit. "Quality" is at one point virtually equated with "popularity," whereas at other points it is related to journalistic awards made by distinguished committees or review boards.

(4) The Commission cites deficient statistical evidence on the program composition of network group and nongroup-owned stations. It does so even though said evidence, submitted by the parties at interest, is seriously marred by faulty, unscientific methodology. It further gives such notably deficient evidence "special weight" although far more systematic, scientific investigations which had already been conducted, yield quite different results, and utilize a more rigorous and scientifically acceptable methodology. That methodology does indeed figure in certain evidence (Parkman on ratings) which, on its own initiative, the Commission cites elsewhere.

(5) The Commission also fails to generate adequate evidence on the viability of informational and issue-oriented programming, on the alleged superiority of network-owned stations and other group owned stations as sources of such programming, as well as of the financial resources allegedly needed to fund it.

(6) Neither the Commission nor the Department of Justice consider the character and relative potential consequences of TV station acquisitions by network and nonnetwork group owners as market-extension conglomerate mergers. Notably lacking is any analysis of the effects of such mergers between stations located in separate geographic areas on potential entry into the UHF band.

I shall discuss each of these deficiencies briefly in the remainder of this statement.

1. The Report's Analysis of "Quality" is Confused

Let us first consider the "full and persuasive record" which the Commission cites as to the likely effects of its Seven Station Rule on viewpoint quality and diversity. Illustrative of that evidence, first, is Parkman's succinct and sophisticated analysis of ratings data for early and late night local news programs. No such study was directly transmitted to the Commission during this proceeding. On its own initiative, however, the Commission makes explicit reference to an article in the Review of Economics & Statistics (1982) where Parkman presents his results (Report, para. 44). There, Parkman establishes that "group owned stations have significantly higher ratings on their local news programs" than nongroup stations. Although not directly analyzed, moreover, the author does break out network owned from nonnetwork group owned stations. For early evening news, he finds no superiority of audience ratings of the programs on network owned stations. However, for late night news programs, he finds that both network owned stations and nonnetwork group owned stations carry programs with significantly higher audience ratings than nongroup stations do.

For present purposes there is no question about the sophisticated nature of Parkman's methodology, or about the prestigious journal which published his paper. More serious are erroneous inferences the Commission draws from Parkman's findings, and the use to which they are put.

Because ratings data are related to the ratio of actual to potential viewing audience for particular programs, they hardly constitute any sound yardstick by which to assess "program quality" in artistic, educational, or informational terms (Report, para. 44, note 46). The confusion is further exacerbated in para. 48 where the Commission next reports NBC's citation of the "lengthy list of honors garnered by NBC-owned stations, including 'national honors such as the George Foster Peabody Award; Ohio State University awards for meritorious achievement in educational, informational, and public affairs broadcasting..etc., etc.' In making a similar point about local news shows on CBS owned TV stations, the Commission then further refers, in note 56 or para. 49, to "a total of at least 65 awards from professional associations in 1983...as well as a combined total of 26 Emmy Awards..." Reference is made, finally, to the "CBS claims that [t]he excellence of (its) news service has been recognized in the dozens of awards each staion has received from leading professional organizations and community organizations."

These are obviously quite different standards of quality -- the ratings data without question approaching a bald market standard, with the "awards" standard approaching a nonmarket standard, set by well-known critics and organizations which assess the programs and make the awards. It is by no means clear that such award-winning O&O programs themselves have higher ratings than comparable programs of nongroup owned stations.

This inconsistent use of ratings and awards data as evidence of quality is further indicated by the well-known fact that PBS programming, widely recognized to be meritorious in cultural, informational, educational, and public affairs terms, often have audiences so small as to be non-measurable by the established ratings services. On occasion, PBS has virtually had to contract for special surveys to create such ratings, and even gone further, to try to devise methodologically different forms of ratings, which differ basically from those used to assess commercial TV program performance. The traditional commercial ratings data, in short, reveal at most a program's popularity, not its quality in terms of educational or informational content, or artistic merit.

Lastly, if the FCC is to rely on the Parkman ratings analysis for local news, it should also have considered the further evidence that for all prime time programming, network owned VHF stations in other studies had audience rating for metropolitan markets not significantly different from those of non-O&O network-affiliated VHF stations. As in the Parkman analysis, these other studies also took account of a large number of carefully selected control factors, and on that score yielded statistics far more reliable, say, than those given special weight in para. 47 [2/] where the Commission discusses findings transmitted by NBC.

3. Do Network-Owned Stations Carry Significantly More Issue-Oriented Programming Than Other Stations? The Report Cites No Reliable Evidence.

As for news, public affairs, local, non-entertainment and informational programming, one wonders what the NAB study by Litwin and Wroth (cited in para. 45, note 46), and the NBC studies reported in para 46 (note 51), and para 47 (note 52), would have concluded had they been conducted with statistical methodology as refined, sophisticated and rigorous as Parkman's. In fact, however, those studies, cited at length by the Commission, must be largely discounted because of their faulty methodology. [3/]

[2/] See, e.g., Levin, loc. cit., note 1, tables 6.5, 5.3, and associated text.

[3/] The Commission itself rejected Litwin-Wroth as unreliable in an earlier Cross Ownership Proceeding. It was actually ignored in the Commission's Final Report and Order in Docket No. 18110, April 6, 1970, paras 36-40. See also, Memorandum Opinion and Order, March 2, 1971, paras. 22-28 (especially para. 25).

The Commission quite properly discounted Litwin-Wroth in 1970, and one therefore wonders why it gives it so much attention in the present proceeding, or indeed, why the National Association of Broadcasters formally transmitted it again in the first place. So subjective an appraisal of media performance, by such an unrepresentative group of respondents, aligned with the community's dominant social groups, in a mere six of the 200 markets with TV stations operating in 1969 (when the Report was filed by NAB), is at best a slim reed for the Commission to lean on. [4]

At the very least, then, systematic analysis of the amount of time devoted to local news, local public affairs, all non-entertainment, and all information, to say nothing of the revenues devoted to such porgramming, is what is indubitably needed for any persuasive case. It is indeed disquieting that the Commission should ground a decision as important as this, to lift the Seven Station Rule to a ceiling of 12 TV, 12 FM and 12 AM station, and in six years, to drop the Rule entirely, on evidence as flawed as the above.

Nor is the NBC tabulation which compares its owned and operated stations, and all other stations in the top 25 markets, any more reassuring (para. 47). The Commission itself, in footnote 52, observes that the NBC figures "would have been more useful (had they) controlled for network affiliation and VHF status as well." One might go still further in challenging the reliability of the NBC findings, and the claims made about the superiority of NBC-owned stations in the quantity and quality of their news and public affairs (local or otherwise), in prime time, and over the whole broadcast day.

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[4] See especiallly, detailed critique in Barnett, "Cable Television and Media Concentration: Part I", Stanford Law Review, January 1970, pp. 260-73. At p. 263, Prof. Barnett writes: "The research methods employed by Litwin were so biased in favor of common ownership, and the premises so arbitrarily contrived to the same end, as to vitiate all the findings and conclusions opposed to diversification. At the same time, despite the biased methodology and the attempts to minimize unfavorable results, the study in fact reports a significant incidence of public harms resulting from concentration of media control at the local level."

The statistical comparison of O&O and non-O&O program time in the top 25 markets, is really impossible to evaluate without isolating out the relative impact on this comparison, not only of channel type and network affilaiation, but also of number of TV homes in the market, and estimated station revenue.

Without considering such additional factors as these among others, as well as appropriate interactions between them, what may superficially appear to be a superior performance by NBC O&Os in the amount of local, all news, local news, all public affairs, local public affairs, and all information, may in actual fact be due to some (perhaps large) measure to *other* factors. The same may indeed be true for the CBS and ABC O&Os. [5] We simply do not know. In a proceeding with such far reaching ramifications, it is disquieting to see the weight the Commission has given such flimsy and potentially misleading evidence.

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[5] The Commission describes the CBS performance in terms even more tenous than it applied to NBC. To state that each CBS-owned station "devotes...from one and three quarters to three and a quarter hours of each weekday's programming to local hard news broadcasts..." (para 49); or that 7 1/2 to 17 hours of each station's weekly program schedule is made up of public issue-oriented broadcast interviews, documentary broadcasts, youth-oriented religious broadcasts, etc. (footnote 56), *reveals little about the intrinsic merit of CBS-owned stations as such*. To determine how much of such public affairs, news, or issue-oriented programs they carried *literally because they were network-owned stations*, the amount of time that CBS-owned stations devoted to such program categories must at the very least be compared with that of *non-O&O affiliated VHF* stations, with and without nonnetwork group owner ties. Account must once again be taken also of market size, number of VHFs in the market, interactions between these two variables, education of market population, station revenue, etc. The FCC simply had no scientific basis for giving network O&Os special merits based on allegedly "superior" quantitative performance in local, issue-oriented programming, without first isolating out the contribution to that quantitative performance *attributable to O&O ownership alone*, and

Following numerous exploratory tests, my own study of the issue (see FACT AND FANCY IN TELEVISION REGULATION, especially chapters 5 and 6), held constant a large number of cogent variables and then found no significant difference between network owned stations and VHF affiliates in the amount of time devoted to a) all local programs, b) all news, c) local news, d) all public affairs, and e) all information (including commercial announcements). Indeed, in local public affairs, one of the most crucial categories, there is at least some evidence that network owned stations carried significantly less local public affairs weekly than affiliated VHFs (86 minutes less), and 112 minutes less than independent VHFs. Only in the category of all information (including commercial announcements) do the O&Os carry 31.8 minutes more than independent VHFs (significant at the 10% confidence level), but with on significant difference between O&Os and the amounts of such programming carried by the affiliated VHFs.

Far more important determinants of program composition (including the above news and public affairs categories) than the ownership of a station by a national network organization, were found to be: a) station revenue, whatever the ownership type, b) age of station (which bears on a station's linkage with preferred advertising and network

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excluding all other potential influences. Nor can weight really be awarded the NAB public service programming study (NAB Comments, Appendix A, pp. 6-8), even thought its programming variables do appear to be carefully coded. Once again, NAB's analysis is simply far too gross for present purposes. The mere analysis of group and nongroup programs in local, informational, and total non-entertainment terms, is far too simplistic for the Commission to rely on. Here, too, as with the NBC and CBS studies, refined multi-variate analysis is needed to segregate out the simultaneous impact of numerous key control factors (of those listed above in this footnote, and on pp. 10-11).

organizations), c) whether a station is network affiliated or independent, and even d) percent of population with college education. The above findings held true, moreover, regardless of whether stations were VHF or UHF, and taking into account market size and number of VHF stations in the market (with heavier weighting given to markets with three or more VHFs).[6]

4. The Commission Is Vague and Ambiguous On Viewpoint Diversity

A primary FCC objective in adopting the Seven Station Rule was to "encourage a diversity of independent viewpoints." For that reason the Commission seeks to analyze "the effect of eliminating this rule on viewpoint diversity..." (para. 24). Throughout the latest Report and Order the FCC refers to diversity of ideas, of programming, of editorial viewpoints, of independent sources of programming and of information (cf. paras. 12, 17, 23-26, 30, 32-33, 35, 37, 41-45, 52, 61-62). Much of its evidence on diversity, however, relates to sources diversity in the broadest, most general tems, viz., in regard to doubling of the number of AM radio stations between 1953 and 1984, the almost seven-fold increase in the number of FM stations, the almost six-fold increase in the number of TV outlets, the new growth of Multi-Distribution Services Systems, the likely entry of thousands of new low-power TV stations, and the wide diffusion of millions of home video cassette recorders (VCRs). (Paras. 34-35)

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[6] An initial and somewhat less sophisticated (but still multivariable) analysis of my original compilations of programming data in 1967, showed no significant difference between O&Os and nongroup stations in the time devoted to all local programming, to all nonnetwork programs, to fine arts and drama, and to feature film. In all news and all public affairs, to be sure, the O&Os did carry some 30 minutes more weekly than all nongroup stations as a whole, taking account of market size, channel type, and network affiliation. However, local news and local public affairs are not broken out, and neither are several critical variables interacted with one another to give full scope to their true impact. Accordingly, I further refined and reconfigured the analysis, updated and enlarged the data base, and used a more sophisticated statistical methodology. The results were striking. For a comparison of the simpler additive statistical model, and the more refined interactive additive model, and of the reliability, accuracy, and validity of coefficients estimated using either method, see Levin, FACT AND FANCY IN TELEVISION REGULATION, especially Appendix I Issue #6 (at pp. 416-22), and more generally, Appendix II, pp. 441-94.

However, there is no explicit or systematic analysis of diversity in terms of program types or program outputs rather than sources. This is true even though sources diversity may but need not yield proportionate amounts of output diversity, and even though output diversity may not require sources diversity. (See Levin, FACT AND FANCY IN TELEVISION REGULATION, 1980, pp. 53-61).

At best, the FCC Report utilizes the diversity concept in a loose and ambiguous fashion. It neither identifies nor distinguishes between sources diversity and diversity of program outputs (cf. program types). Nor does it distinguish between program options and program types, or between, say, options or types across all stations in the market (cf. horizontal diversity), or as the average number of programs, program types, or program options, carried daily on any station, or class of station, throughout the broadcast day (cf. vertical diversity, where a vertical time slot is each 15-minute period, 6PM-11PM each day of the week). (See Levin, ibid., Table 3.1, at p. 54; see also, analysis and discussion at pp. 54-61). The Commission's failure to clarify its concept of diversity must be faulted further in that program type diversity is by now grounded on a typology which analysis and empirical assessment show to be operationally valid, i.e., to be perceived as such by viewers. (See ibid., pp. 62-87, 90-91; also Appenedix 3A).

The Commission must be faulted, finally, because it, itself, is hardly unaware of the fact that sources diversity and output diversity need not necessarily coincide. In para. 52, it notes that "[t]he fact that...diversity of viewpoints in local news reporting and in editorializing on local issues exists alongside a group or network ownership structure means that it is indeed possible to have greater viewpoint diversity than there is ownership diversity (emphasis added)." This makes the Report's failure to spell out its own diversity concept for purposes of regulatory assessment, or to seek out evidence in those terms, all the more puzzling.

5. Some Illustrative Evidence on Program Diversity

In sum, cursory review of an exhaustive analysis of the relative contribution of network-owned stations, non-owned affiliates, and independent stations, to different kinds of program type diversity, yields the following pertinent conclusions:

(1) The presence of O&Os has no significant impact one way or the other on the number of program types across all stations in 143 TV markets in 1967, in prime time, or of the number of program types per commercial station (cf. horizontal diversity) (cf. Levin, loc. cit., Table 5.2, at p.145).

(2) This is true even after account is taken of network affiliation, channel types, nonnetwork group ownership, newspaper ownership, market size, or number of stations in market (cf. ibid., Table 5.2, at p.145).

(3) The same holds true also for so-called vertical program type diversity, pertaining to the average number of program types carried by different stations daily, in prime time.

(4) However one conceptualizes types diversity, then, the impact of network-owned stations is not signficantly different from that of nongroup owned stations, holding constant the same independent variables just cited (cf. ibid., Table 5.3, at pp. 146-47).

(5) It holds true, finally, even when account is taken of the number of PTV programs and stations in the market, market size, median family income, and the number of commercial programs. (Ibid., Table 8.1).

6. The Report Fails to Analyze the Viability of Issue-Oriented Programming

A further, final issue raised by the FCC's Report pertains to its assertion that it "ha[d] been given no evidence indicating that stations which are not group owned better respond to community needs, or *expend proportionately more of their revenues on local programming...and produce more news, investigative journalism or issue-oriented programming* (emphasis added)." (Para. 53).

As with other pieces of evidence where the Commission cited the absence of "more" or "better" evidence presented to it, here, too, one cannot but feel distressed at the failure of a federal agency to seek out such evidence *affirmatively,* in particular by mounting basic studies of its own (as in the Network Proceeding). Clearly such issues are analyzable, and contradictory findings should be assessed.

Several points should have been scrutinized:

(1) To infer that stations with more revenues (like O&Os) are better able than less affluent ones to carry more of the relatively less profitable informational programming, by no means implies that all such programming is unprofitable, absolutely.

(2) In fact, stations which carry more information give advertisers access to the kind of educated higher-income viewers more likely to consume the advertised product. Understandably, therefore, such stations appear to command premium rates from advertisers, at the margin at least. (Levin, ibid., p.317).

(3) Hence, one must mention two caveats regarding the Commission's observation that there is no evidence that nongroup owned stations spend more of their revenues on local or issue-oriented (public affairs) programming.

A. There is no significant difference between group and nongroup owned stations, or between O&Os and nongroup owned stations, in the amount of public affairs they carried in 1967 (though in both cases, nongroup owned stations carried less news). Nor, using a more refined analysis for 1972, is there any evidence at all that O&Os devoted significantly more of all local, all news, all local news, all public affairs, or of all local public affairs, than affiliated VHFs did in that year. Wholly aside from the revenues devoted to such programming, then, the amount of program time so devoted gives no special merit (or demerit) to network or nonnetwork group owner.

B. It is true that stations earning higher revenues, other things equal, devote 2 or 3 minutes more time per week to local, all news, local news, all public affairs, and all information (including commercial announcements), than stations earning smaller revenues. (See Levin, ibid., Table 6.13, at p. 203.) But this by no means implies that informational programming is normally so non-renumerative as to require cross subsidy from more lucrative program activity. The TV networks are well-known not to lose money on their news and public affairs programming, once program costs are taken into account.[7/] It is indeed widely assumed that network affiliates as a class may earn as much as 40-60% of their revenues from advertising on local news shows.[8/] The fact is that news and local public affairs shows are normally very low-cost. Therefore, the revenues they generate add relatively more to net income than they would if their program costs were comparable to those for comparable network programming, or for network entertainment programs generally.

[7/] Robert Crandall, "Regulation of Television Broadcasting," Regulation, Jan./Feb. 1978, pp. 31-39.

[8/] Broadcasting, August 28, 1978, p. 35.

Such issues should have been explicitly addressed, analyzed, and disentangled before the Commission concluded that the absence of evidence that nongroup owned stations divert more revenues to local interest or issue-oriented programming, gave group-owned stations (including O&Os) a "merit" which helped justify abrogation of the Seven Station Rule (para. 53).

Furthermore, evidence on the viability of local and issue-oriented programming (as well as on the amount) should also have been considered before the Commission proposed to drop the Seven Station Rule for First Amendment purposes. That is, before First Amendment values and the FCC's "concern for a well-informed citizenry" compelled it "to give special weight" to evidence alleged to show a greater quantity of public affairs and news programming. (Report, paragraphs 55-56.)

7. The Commission Fails to Consider the Anti-Competitive Consequences of TV Station Acquisitions on Potential Entry Into the UHF Band

As for the prevention of anti-competitive activities, the Commission's "other primary concern...when it adopted the Rule of Sevens..." (para. 64), the Report gives special weight to the Department of Justice's conclusion that "elimination of the Seven Station Rule will raise little risk of adverse competitive effects in any market," and that "license transfers involve no significant competitive risk merely because they result in common ownership of more than seven stations in a broadcast service." (para. 65.)

Furthermore, the Commission notes (in para. 5) that "[i]t will continue to scrutinize each individual acquisition to assure itself that the acquisition does not contravene any of the Commission's public policy concerns, particulary those related to diversity and competition." It notes further that "some buyers of stations may have superior skills...and may be able to do a better job of matching programming to local tastes and thus gain larger audiences...(and therefore) earn more from the station and hence value it more highly" (para. 82). Furthermore, the Report continues, "some group owner may have cost advantages derived from economies of scale" (para. 82). Station purchase prices may in any case be higher, the higher the "stream of revenues the station would yield over...time...(insofar as that) determines how much (the buyer) is willing to pay to purchase that yield, plus the potential for an increase in market value" (para. 83).

How likely is it, then, that group acquisitions of additional stations with the recission of the Seven Station Rule, will "permit the group owner to act in an anticompetitive manner?" The FCC and Justice Department rule this out as "highly unlikely" (para. 84), their main reason for doing so in part being that the national advertising market is already "dominated by the three national networks." Dropping the Seven Station Rule "will not increase concentration in the national network market, because each network has already achieved access to almost every local market through its affiliation agreements (para. 71).

On the other hand, spot advertising is alleged to be sold in local geographic markets, providing advertisers with access to specific local markets only, such that "[i]f the price is too high, the amount of advertising may be lowered, but...will not be switched to another market" (para. 70). Because the Rule "does not address concentration in (local geographic) markets," we are told, "a rule change should not affect competition in spot advertising." (Para. 71.)

Lastly, the Report contends that "the fact that local competitors may share common ownership with stations in other markets (emphasis added) is unimportant in terms of competitive harm...(because) the Commission's local rules...restrict common ownership in local markets (emphasis added)" (para. 73). The Report then concludes that "the prohibition against common ownership of two competing stations in the same market and service makes the Rule of Sevens unnecessary as a guarantee against competitive harm" (para. 73).

I must take exception to that conclusion, as well as to its economic and regulatory premises. At the very least, a far more thoroughgoing analysis of the competitive aspects of TV station mergers and acquisitions was needed before the FCC and DOJ could properly conclude, among other things, that (a) the so-called duopoly rule (which prohibits common ownership of competing TV stations in the same market) is a more than adequate safeguard against any competitive harm alleged to follow from lifting the Seven Station Rule (para. 73); and that (b) the rule change "should not affect competition in spot advertising...(because)...spot advertising is sold in those local geographic markets, and the rule does not address concentration in those markets..." (para. 71).

In line with the Commission's promise to "continue to scrutinize each individual acquisition to assure...that...(it) does not...(impair)...diversity and competition" (para. 5), finally, the Commission and the DOJ should both have given explicit attention to group owner acquisitions of TV stations as market-extension conglomerate mergers.

Specifically, broadcast mergers and acquisitions can be classified as horizontal, vertical, or conglomerate. Under the duopoly provision mentioned in this Report (cf. para. 73), these potentially most anti-competitive mergers (of two TV stations in the same local geographic market) simply cannot occur. The Commission is quite correct about that aspect of the competitive safeguard of duopoly rules which seemingly render the Seven Station Rule unnecessary.

Less clear, perhaps, is whether the forward acquisition of more TV stations by major TV network program suppliers will significantly foreclose their new local geographic markets from alternative sources of program supply. But for argument's sake, even granting the Justice Department's analytical contention to the contrary (DOJ Comments, pp. 23-25), there remains the inscrutable total neglect of the market-extending character of TV group mergers and acquisitions, and of their effects on the probability that: (a) a group owner entering a market may deter net new station entry therein: (b) the group owner's acquisitions may lessen potential competition because, had the merger been prohibited (by the existing Seven Station Rule or otherwise), it would have entered through internal company expansion; or at the least, (c) the group owner would have remained a potential threat at the sidelines, if entry by merger were precluded.

What is notably missing from the economic analysis in this Proceeding, in short, is any systematic scrutiny of TV group owner acquisitions in terms of their effects on potential entry. Even if stations are located in separate geographic areas, that is, preventing a merger might induce a group owner in one market to build a new station in a second market. Or, at least, to hover at that market's threshhold, posing a potential threat of entry (that may or may never materialize).

When I examined this issue in 1970, [9] I found few if any VHF outlets available in the top 50 markets, or elsewhere. Hence the likelihood then that preclusion of a group acquisition would generate net new entry depended largely on the potential viability of unused UHF channels in the second market. I did find numerous unoccupied UHFs at that time, but deficient viability to support the potential entry hypothesis. Today, thirteen years later, the situation could well be decisively different.

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[9] H. Levin, "Competition, Diversity, and the Television Group Ownership Rule, Columbia Law Review, May 1970, reprinted in Yearbook of Broadcasting Articles, Federal Publications, 1980 (Anthology Edition of 21 Articles Published Between 1934 and 1978).

The Commission and DOJ do clearly owe the public at least some scrutiny of that issue, and a direct, systematic review of group acquisitions as a form of market-extension conglomerate mergers in geographically separate markets. This is clearly true in light of DOJ's assertion that, "[s]ince mere ownership of more than seven broadcast services will raise no competitive problems, consideration of the competitive issues raised by broadcast license transfers should impose no burden on Commission resources." (DOJ Comments, p. 27, also, at pp. 2-3.) It is true, also, given DOJ's conclusion that, however the Commission handles the competitive element in the public interest standard, the DOJ will itself "continue to evaluate the competitive effects if mergers and acquisitions of TV and radio stations to determine if they violate federal antitrust laws." (Ibid., p. 30.)[10]

Finally, it is particulary true of TV station acquisitions by the three national network companies whose preponderant power in the markets they and their O&Os already operate in, may more likely upset interstation competitive balance in the new markets they propose to enter through the merger route. Thus there is little question that the national network companies have far more economic power than the several nonnetwork groups.

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[10] Unoccupied and non-viable UHF outlets today may conceivably become less so tomorrow. A cursory review of the Commission's latest count of TV allocations by channel type and market size, reveals that 24 UHF outlets are still vacant in the top 50 ADI markets, another 24 vacant in the second 50 markets, and 98 in all 225 markets. This compares with 27 UHF vacancies in the top 50 in 1968, and 57 vacancies in the second fifty markets. Depending on the rate at which UHF markets become viable, many more instances may arise where the Commission must scrutinize potential entry issues on a case-by-case basis. The time to consider any such eventuality is *before* the Seven Station Rule is modified, or eliminated, not after numerous acquisitions across geographically separate markets create increasing numbers of potential entry cases. For the latter would necessarily require detailed, costly, and time-consuming review by a Commission whose imminent proposed rule change would ironically have created the problem in the first place.

As for horizontal position, e.g., whatever the actual record on business conduct, the networks are surely better able than the nonnetwork groups to collude on rates, market shares, and even program schedules. The well-known fact is that each network faces either or both its rivals in virtually all TV markets. It does so in part through the stations it owns outright, and in part through the hundreds of others with which it is affiliated. In their horizontal structure, then, there is no question that the networks are intimately aware of one another's pricing and programming decisions.

In contrast, there are widely recognized safeguards against nonnetwork group collusion or interdependence. First, the groups normally do not affiliate all their stations with any single network, and hence are less likely than otherwise to derive special advantages in bargaining for premium network compensation rates, or time rates. Second, the average group owner in top markets confronts as many separate competitors as there are stations in its markets, mainly because no group normally faces the same group rival in more than one market. The likelihood of group owned stations tacitly (or overtly) agreeing to share markets, or engage in parallel pricing would clearly be greater where two or more groups faced each other across the whole group, i.e., in all of their TV markets. Available evidence indicates this not to be the case.[11] Thirdly, vertical as well as horizontal structure insitutes more decisive safeguards against potential business restraints by the nonnetwork groups than by the networks.[12] Few would quarrel with the above contrast in respective market power of network and nonnetwork groups. But beyond this, the O&Os are widely recognized as the networks' biggest money earners, providing the bulk of the consolidated profits of each network company and it O&Os as a whole. These supernormal O&O profits are, indeed, derived in some measure from the entry barriers imposed by the FCC's Table of Allocations in the more lucrative metropolitan markets, and in particular, by the dearth of VHF outlets located therein.

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[11] Ibid., p. 795.

[12] Ibid., pp. 795-799.

Additional acquisitions by network groups would further strengthen network entrenchment in the key TV markets, and their resultant market power. Yet still notably lacking here is any DOJ or FCC analysis of the competitive side-effects of TV group mergers and acquisitions where the networks, as the acquiring firms, are already dominant in national TV network advertising, and account for nine-tenths of prime time TV program clearances. For example, would the networks' further, let alone unlimited, acquisition of nongroup VHF network affiliates (or even of VHF independents) result in greater competitive imbalance in the leading markets? Would it do so more than would comparable acquisitions by nonnetwork groups, which do not dominate their present markets locally, or regionally, nearly as much as the TV networks do? Would lifting the Seven Station Rule reduce the economic incentives to enter UHF markets, significantly more for network groups than for nonnetwork groups?

CONCLUSION

The FCC's Report and Order proposing to lift the present 7-station ceiling on TV Group Ownership, and in six years to eliminate it completely, is severely marred by frequent reliance on methodologically deficient evidence. A proposed regulatory change this far reaching requires more detailed and scientific assessment of key factual presuppositions. Nor does the failure of the several parties hitherto to transmit more complete and rigorous evidence relieve the Commission from its important affirmative public interest responsibilities.

By way of illustration, I have identified and briefly discussed six examples of unsound premises: (1) the Commission's use of inconsistent concepts of "quality;" (2) the Commission's failure to specify an unambiguous concept of "diversity;" (3) the Commission's explicit reliance on an outdated and badly faulted study of group owner programming, rejected by the FCC in an earlier proceeding; (4) the Commission's further reliance on methodologically deficient studies of the program composition on network-owned stations; (5) the Commission's failure to examine evidence on the viability of informational and issue-oriented programming whoever produces and transmits it, before granting any special 'plus' to affluent, top market-entrenched network O&Os; (6) the total absence of any assessment of the likely TV group owner acquisitions when the present rules are altered, or eliminated, as market-extension conglomerate mergers which could deter potential entry into the UHF band.

Time being of the essence, this critique has necessarily drawn on the writer's own published studies of TV group ownership and the rules geared to limit it. That evidence was painstakingly developed over a 9-year period with support from two well-known scholarly research foundations. I offer these published findings as no "last word" on such hotly contested issues, but simply to underscore the compelling case for the Commission to undertake a far more balanced and systematic investigation before it acts. If nothing more, the critique urges us to look more carefully before we leap.

STATEMENT OF
THE NATIONAL ASSOCIATION OF BLACK OWNED BROADCASTERS
BEFORE THE SENATE JUDICIARY COMMITTEE

JAMES L. WINSTON
EXECUTIVE DIRECTOR AND GENERAL COUNSEL
September 10, 1984

Mr. Chairman and Senators, thank you very much for this opportunty to present testimony before the Committee.

Founded in September of 1976 and incorporated a year later, NABOB grew in response to demands from Black station owners for representation and information regarding financial, legal and political issues facing them in the industry. NABOB is the first and only trade association organized to foster ownership of broadcast facilities by Blacks. Today there are 136 Black owned commercial radio stations and 7 commercial television stations. NABOB's active membership represents over 75% of all Black station owners, who themselves reach over 90% of all Black Americans.

It has been approximately two years since NABOB was last invited to speak before the Senate. At that time, NABOB expressed its concerns about a substantial slowdown in the growth of ownership of radio and television stations by Black entrepreneurs. We explained that the principal cause of the slowdown in the growth of station ownership appeared to be the general slowdown in the overall U.S. economy. However, we also noted that a shift in policy focus by Chairman Mark Fowler appeared to be a contributing factor to the slowdown of Black station ownership. At that time we stated that, "Chairman Fowler has expressed his interest in abolishing the multiple ownership rules and in ending 'localism' as a matter of concern to the Commission in the awarding of new licenses for broadcast facilities." We went on to explain that "although not directly antagonistic to minority interests in themselves, actions abolishing these two policies will have their greatest negative impact on minorities, because the result will favor larger business entities."

Two years later, we have now seen the FCC move forward on the proposal to eliminate the Seven Station Rule just as Chairman Fowler expressed. Although Chairman Fowler was not successful in convincing a majority of the Commission to vote for total repeal of the Seven Station Rule, "immediately" he was able to convince them to adopt a Twelve Station Rule now with total repeal to come in six years.

NABOB continues to believe that repeal or substantial modification of the Seven Station Rule will have its greatest negative impact on minorities; and we continue to support retention of the Seven Station Rule for all services--particularly radio.

There are two separate areas of concern in the Seven Station Rule--radio and television. The FCC gave radio little attention, as if it was a foregone conclusion that a radical increase in the concentration of control of this industry is in the public interest. Nothing could be further from correct. The FCC's analysis failed to demonstrate any justification for a radical change in the ownership limits in this industry. In 1951 group owners owned 8.9% of radio stations and in 1980 groups owned 27.1%. With the percentage of the radio industry under group ownership steadily escalating, it would certainly appear to be precisely the wrong time to abandon a rule designed to prevent domination of the radio industry by a few group owners. Rather, it seems clear that the present lack of excessive concentration of control of the radio industry exists because of the Seven Station Rule--not in spite of it. If there is a reasonable level of diversity of ownership in radio station ownership, the existence of the Seven Station Rule is to be applauded not condemned.

By this action the Commission eliminated local ownership as a valued Commission tool for assuring diversity of ownership and viewpoints and chose instead to encourage major group ownership of broadcast stations. In so doing the Commission concludes that the economic efficiency of group ownership will best serve the public interest. This conclusion wil substantially undermine the Commission's Minority Ownership Policy.

Elimination of the Seven Station Rule will stimulate a major increase in group ownership of radio stations. This will have a negative impact on all one or two station owners (referred to here as "small station owners"). This will disproportionately affect Black and other minority station owners, because they generally fall into the small station ownership group. Such small station owners wil face a much different level of competition from large group owners competing in their markets. First, the group owners will be able to use their financial strength to engage in competition on a much more intense level, such as through the use of commercial free programming periods, expensive media advertising campaigns, and contest give-aways.

Secondly, the increased concentration of ownership will bid up the prices of stations. Once the potential buyers with the most financial strength, the group owners presently at or near the seven station limit, come back into the station purchase arena, through acquisitions or, more importantly, through mergers of major group owners, they will be able to pay higher prices or provide better purchase terms than smaller business concerns. The result will be that the smaller business concerns will find it more difficult to "trade-up" to more desirable stations and new entrants will find it virtually impossible to buy into the industry at all. This will be especially true for minorities seeking to buy into the major markets where minorities tend to live.

Because Blacks and other minorities fall squarely into the group of negatively affected parties, the radical change in the Seven Station Rule causes NABOB great concern. For 30 years the Commission lived by one set of multiple ownership rules. Now, when Blacks finally begin to "play the ownership game," the Commission has changed the rules of the game. The new rules will, once again, work to the detriment and eventual exclusion of Blacks from broadcast ownership.

On behalf of NABOB, I would like to urge this Committee to reverse the FCC's determination that large group ownership of broadcast media should be encouraged. We urge you to direct the FCC to return to the Seven Station Rule, which recognized that ownership of facilities using the nation's airwaves should be disseminated among a broad array of voices. Thank you.

Senator HATCH. So we will call Ronald L. Olson, Esq., of Munger, Tolles & Rickershauser, of Los Angeles, CA, and the Honorable Henry Geller, the executive director of the Washington Center for Public Policy Research, and Bruce C. McGorrill, the executive vice president and chief executive officer of the Maine Broadcasting System, of Portland, ME.

We are happy to welcome you gentlemen here. I have a tremendous problem. I have to be at the White House, so if I could I am going to automatically put all of your statements in the record as though completely delivered. I hope you can summarize in 5 minutes or less. I am going to have to cut you off in 5 minutes if you cannot and hopefully we can have just a couple of questions before I have to leave.

So we will turn to you first, Mr. Olson and go from there.

STATEMENTS OF A PANEL CONSISTING OF RONALD L. OLSON, ESQ., MUNGER, TOLLES & RICKERSHAUSER; HENRY GELLER, EXECUTIVE DIRECTOR, WASHINGTON CENTER FOR PUBLIC POLICY RESEARCH; AND BRUCE C. McGORRILL, EXECUTIVE VICE PRESIDENT AND CHIEF EXECUTIVE OFFICER, MAINE BROADCASTING SYSTEM

Mr. OLSON. Thank you, Senator Hatch. My name is Ron Olson. I am here to speak in opposition to any further extension of network expansion or monopolization. The bias that I come with is about 20 years as a trial lawyer. Some would say that I'm an antitrust lawyer, but mostly I take whatever comes in the door.

One thing a trial lawyer is trained to do is to listen. And because I think I heard Mr. McGrath make a critical admission in response to one of your earlier questions Senator Hatch, I want to comment on that first.

Mr. McGrath, if I heard him correctly, acknowledged the statement that the Department of Justice filed in another FCC proceeding about a year ago. He acknowledged the networks' critical power in the programming market. He acknowledged that ABC, CBS and NBC are the gatekeepers with regard to national programming. Because of that critical power he indicated that the Department of Justice then opposed fundamental change in the financial interest and syndication rules and urged the FCC to go slow in reevaluating these important rules.

But then he went on to say that it is different for advertising. Well, I only have one qestion, Senator Hatch: Have you ever seen a TV advertisement that was not connected to a program? Of course not, and the Department of Justice knows that. The networks are the "gatekeepers" with regard to programs and they are the gatekeepers with regard to the advertising message. Network predominance is a fact in both markets.

Senator HATCH. I have been a little astounded with the Department of Justice's testimony as well. I just have to tell you that, and I am concerned about the narrowness with which they have viewed this whole area. They have used the most narrow considerations in order to make their formulations that I have ever seen. I think there is much more that just simply has to be considered.

Mr. OLSON. Based on nearly 10 years of litigation against the networks, some of which was along side the Department of Justice, I have come away with a couple of very fundamental conclusions. One is that the concentration of ownership of 15 large-market television stations, in the networks and alongside their program distribution function restricts economic competition with respect to advertising, with respect to competition for the audience, with respect to program acquisition. But, second and equally inportant it also restricts competition in the marketplace of ideas and you Senator Hatch, and certainly a number of your colleagues, recognize the inner relationship between the two. To isolate consideration of economic effect and to ignore the social inplications is, in my mind, narrowminded and absurd.

Now, let me begin the central message that I wish to leave with this committee. Anyone assessing the markets in which the networks operate must recognize that the networks have monopoly power and will try to extend it and enhance it at every opportunity. Fighting against the networks is a little bit like fighting against Rocky Balboa. They never quit, and you have to be almost an Apollo Creed, like Ted Turner, to even get in the ring.

If you fight against the monopoly power in one market, the networks promptly assert it somewhere else. Last year, it was their stretch for more control over programming by seeking to eliminate the financial interest and syndication rules. This year it is more station outlets by eliminating the seven-station rule. Next year it will be something else, and then they will be back to the financial interest syndication rules.

So my first point is simply this: The current push to own more stations is really only part of a coordinated, constant commitment that the networks have to extend monopoly power.

My second point: The flag that the networks wave to support these power grabs is phony. It is the see-through variety. Before the FCC and Congress, networks proclaim, as we heard Mr. Erlick do today, that the new technologies, the new media have changed the structure of television. They have done well with this flag. I am told that they have even convinced Chairman Fowler to the point that his speechmaking has included the assertion that the new media is threatening free television.

Well, I will tell you what my dad would say if he heard me make that assertion. He would lean over, put his arm around my shoulder and say, "Son, I believe you, but thousands wouldn't," And that is the way I feel not only about the threat to free television statement, but also about Mr. Erlick's statements concerning the threat to network profits. And, rightly so. Even the networks don't believe these statements. While part of their network armies are here in Washington saying one thing, another part are in New York, Los Angeles, Chicago and elsewhere talking to the affiliates and talking to the advertisers saying quite another thing.

Time is not going to permit me, in light of what has gone on here, to really go through their own documents in detail.

Senator HATCH. I would be happy to have you submit those for the record.

Mr. OLSON. We have them. They are attached to my statement. But let me just simply say that these documents make a lie out of their allegation that there is a real competitive threat from new media and new technology.

In very summary form, CBS claims that by 1990—this is them looking ahead—the networks will reach audiences more than twice as large as all other sources combined. That is in their own documents. They boast that "we will absorb"—that is their word, "absorb"—"new technologies as they emerge, and by 1990," they claim, "the predominant share of television audience and advertising revenues will be right where they are today, with the networks." That is out of their documents, and ABC and NBC make similar statements. And well they should, because that is the nature of the marketplace dominated by the three networks. And that is my third point.

Today at the Department of Justice and the FCC, it is like Houdini at work. For over 30 years, the Department of Justice and the FCC, both agencies, have struggled to restrain network power. Both of them have worked hard at it. But now all of a sudden the concern for abusive network power has disappeared, magically disappeared. For 8 years I observed, monitored and worked in litigation that the Department of Justice brought against the three networks. They charged the networks with monopolizing prime time.

These Department of Justice lawsuits were supported over a long period of time, 1972 to 1980. They were not partisan; the Justice Department under three different administrations, two Republican and one Democratic gave support to these lawsuits. On the eve of trial, the judge in that case required the Department of Justice to file written evidence, an offer of evidence as to what they were going to prove at trial. They did. Copies are attached to my statement. Again, I am not going to take the time to review it, but let me simply say that it included three lines of proof. One was that each network used its nationwide chain of Government-granted monopolies, owned and operated stations and affiliates, to monopolize network television.

The second was that the networks used their monopoly power to eliminate competition by nonnetwork broadcasters. The third line was that the networks know precisely what each other is offering with respect to prices, terms and conditions for programs, and that each offers similar prices, terms and conditions.

Now, that last line of proof, Senator Hatch—and I might add that until today I did not realize that the network parallelism also extended into congressional testimony—but that last line of proof, which sounds very telling to me and a lot like price-fixing, was based upon an ABC stipulation. It was not an offer of proof for which the Government could bring in a bunch of witnesses and prove it up—ABC stipulated to that parallelism. They signed and filed the stipulation. That stipulation is attached to my testimony. Again, I urge the Senators to review it.

Senator Hatch, I know you were a prosecutor, and I know you understand that defendants do not generally make admissions prior to trial unless there is something more telling and more harmful that might be proved if they do not make the admission.

Now, irrespective of whether that is the case or not, I think it helps us understand the limitations of what the gentleman from ABC meant today when he said there is "intense" competition between the three networks.

In any event, the cases against the networks were settled by consent decrees and in support of those consent decrees the Department of Justice said this: "The structure of the market is such that each of the three networks controls program producers and advertisers' access to the Nation's commercial television audiences, and each network has abused its power." That statement by the Department of Justice was made in 1980.

Now, what has happened to change the structure since then? Nothing, of course.

Without belaboring this further, I would like to underscore what Senator Wilson said this morning—that we have to be clear about what the networks mean by deregulation.

What they mean by deregulation is peeling off one layer of regulation, that which is designed to limit their use and abuse of power granted them by another level of regulation. That other level of Government regulation—the allocation of spectrum exclusivity to their owned and affilliated stations—they are in full support of and would be down here fighting if there was any threat to it. And why not? Do you know of any other business except some public utilities that are able to preclude competitors from entry by Government regulation? The networks are in that position.

Time is short. I am simply going to make my fourth point by saying that a case by case control of network acquisition is not only unworkable and unrealistic but unbelievable. Thank you very much.

Senator HATCH. Thank you. Mr. Olson.

[The following was received for the record:]

TESTIMONY OF RONALD L. OLSON

Munger, Tolles & Rickershauser
Counsel to the Committee Against Network Dominance
Before the Judiciary Committee of the United States Senate
September 11, 1984

I am a partner and litigator with the Los Angeles law firm of Munger, Tolles & Rickershauser. I have over the past ten years represented the members of the Motion Picture Association of America and other suppliers of television programs in a variety of antitrust and First Amendment proceedings involving the three national networks, ABC, CBS, and NBC. For example, I represented motion picture and television producers in connection with the United States' antitrust lawsuits charging the networks with monopolizing prime-time programming. The Government there obtained consent decrees limiting the networks' practices vis-a-vis the producers and others. I also represented the creative guilds (writers, screen actors, and directors) and independent television producers in challenging the "Family Viewing Hour" as illegal collusive conduct between the FCC and the networks. More recently, I assisted the Committee for Prudent Deregulation in fighting to preserve the FCC's financial interest and syndication rules which limit the networks' control of syndicated programs, the "life-blood" of independent television stations.

I am here today to testify concerning the anticompetitive risks involved in permitting the three national networks to own more local television stations, and, I hope, to share the lessons I've learned from these experiences with you.

Most of what you have heard from others concerns "diversity" -- the goal of ensuring that the maximum number of voices and viewpoints reach the American public on television. I am going to be talking about "competition." The ideas are not at all separate, however, at least not with respect to the television industry, because both policies reflect a preference for more rather than fewer independent participants.

The number of "voices" in the televison "marketplace of ideas" is directly related to the number of competitors in the economic markets of television -- the markets for programs, for advertising time, and for audiences. Thus, it is no coincidence that the languages of "diversity" and "competition" frequently are the same. As the Supreme Court said in the Red Lion case:

> "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market whether it be by the Government itself or a private licensee."

Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969) (emphasis added).

Concentration of ownership restricts the marketplace of ideas as truly as it restricts marketplace competition in the sale of advertising, the purchase and distribution of programming, and the effort to attract audiences. Thus, the power of the networks in the economic marketplace of television goes hand-in-hand with the networks' control over the information, opinions, and entertainment which reach the American public.

The conclusions that I want to share with you include the following four points, each of which is critical to your consideration of the FCC's proposed action permitting the networks to acquire more broadcast stations:

First: THE NETWORKS ARE ENGAGED IN A COORDINATED EFFORT TO "UNREGULATE" THEMSELVES FULLY, SO THAT THEY CAN INTEGRATE INTO EVERY ASPECT OF TELEVISION BROADCASTING, OWNING AND CONTROLLING THE PROGRAMS, THE DISTRIBUTION SYSTEMS, AND THE LOCAL STATIONS. IF THEY SUCCEED, THEY WILL HAVE THE ABILITY TO ELIMINATE VIRTUALLY ALL COMPETITION FROM THE TELEVISION INDUSTRY.

Second: THIS ENTIRE EFFORT BY THE NETWORKS IS PREMISED ON A SINGLE FALSE PREMISE -- THAT "NEW TECHNOLOGIES" AND "NEW MEDIA" HAVE TOTALLY CHANGED THE STRUCTURE OF THE TELEVISION INDUSTRY. IN FACT, EVEN THE NETWORKS PROJECT THAT FOR THE FORESEEABLE FUTURE THEY -- ABC, CBS AND NBC -- WILL CONTINUE TO DOMINATE THE TELEVISION MARKET.

Third: THE FEDERAL COMMUNICATIONS COMMISSION, IN DECIDING TO REPEAL RESTRICTIONS ON NETWORK OWNERSHIP OF BROADCAST STATIONS, HAS MISUNDERSTOOD THE REGULATED, CONCENTRATED STRUCTURE OF THE TELEVISION INDUSTRY AND IGNORED THE FACT THAT OWNERSHIP OF STATIONS BY THE NETWORKS IS DIFFERENT FROM AFFILIATION, GIVING THE NETWORK THE POWER TO ELIMINATE DIVERSITY AND COMPETITION FOSTERED BY 40 YEARS OF FCC REGULATION.

Fourth: THE IDEA THAT THE FCC OR THE DEPARTMENT OF JUSTICE CAN MONITOR AND PREVENT ANTICOMPETITIVE ACQUISITIONS AND PRACTICES BY THE NETWORKS ON A "CASE-BY-CASE" BASIS IS UNREALISTIC, AT LEAST UNLESS THEIR STAFFS AND BUDGETS ARE SUBSTANTIALLY INCREASED. IN FACT, THE EXPERIENCE OF THE DEPARTMENT OF JUSTICE DEMONSTRATES THAT ONLY CLEAR, PROSPECTIVE RULES LIMITING NETWORK BEHAVIOR WILL BE EFFECTIVE IN PROTECTING COMPETITION.

* * * *

Before addressing each of these points, let me summarize briefly the formal critique of the FCC's Report and Order which I have attached to my testimony. Analysis of the television market tells me that permitting the networks to own more stations will reduce both the number of voices in the "marketplace of ideas" and the number of competitors in television's economic markets. In support of that position, two fundamental arguments are made. First, network acquisition of stations will reduce existing competition -- such as it is -- by restricting the number of independent buyers and sellers in the television programming and advertising markets. Second, it will stunt the growth of new competition by making it far more difficult for new companies to enter the market or for national groups strong enough to compete with the three networks to develop. The ultimate result -- particularly if the Commission's repeal of limitations on network ownership of stations is followed by network successes in their other efforts to "unregulate" themselves -- will be that there will remain only three competitors -- three "voices" -- in the television industry. That will be a disaster for the American public, both as "consumers" of TV programs and advertised products and as "citizens" seeking information and opinions about the world.

The best way for me to explain my reasons for reaching these conclusions, I believe, is to elaborate on the four points I raised at the very outset and explain how each relates to your consideration of network ownership of local broadcast stations.

* * * *

First, it is clear that the networks have in recent years launched a coordinated effort to integrate themselves fully, so that they will own and control every aspect of the television industry. Let me cite a few examples. In the present proceedings, of course, the networks are seeking to be allowed to own more local stations, the "outlets" of television broadcasting. Recently, they attempted to undo the FCC's limitations on their ownership of programs -- the financial interest and syndication rules -- so that they could control the "raw materials" of broadcasting. The networks have made noises of late about having all or parts of the antitrust consent decrees I mentioned lifted, again allowing them more control over programs.

As it is, the networks are the "gatekeepers" of television, standing as virtual monopolists between program producers and advertisers and the national television audience. Only through the networks' distribution system of affiliates -- the "gate" -- can those producers and advertisers reach the national audience essential to their success. If the networks succeed in controlling the raw materials -- the programs -- and the "retail" outlets -- the stations -- as well as the distribution network, they will have the ability to eliminate virtually all competition from the free television industry and stunt permanently the development of competition from new media.

* * * *

Second, the networks have based this coordinated strategy on a single, appealing, but fundamentally wrong premise -- that "new technologies" and "new media" have totally changed the structure of the television industry. The reason they adopt this argument, of course, is clear. Their historical dominance of television is not based on their superior management abilities or their efficiency, so that they cannot argue, as others such as IBM have, that existing regulation is merely impeding their proven efficiency. Instead, the networks' dominance is based on regulation -- regulation made necessary by the technical facts about broadcasting: the limited spectrum of wavelengths. This regulated market structure, deriving from the FCC's allocation of the broadcast spectrum, gave the networks their power, and the FCC and courts in turn have found it necessary to regulate the networks' abuses of that power. Hence, the networks seek to justify "deregulation" by claiming that the original structure is somehow "gone," and with it the need for regulation.

But the claim is totally baseless. Indeed, the networks themselves don't believe it -- even they believe they will continue to dominate the television industry much as they have in the past. They may fear that the new media will someday begin to erode their dominance -- and for that very reason they are attempting to consolidate their power now, buying into the new technologies themselves and seeking deregulation to enable them to foreclose others from programs and outlets -- but they don't see it happening soon.

A copy of an interesting publication from CBS, called "The Road to 1990," is appended to my written testimony. It is perhaps the most telling assessment of the effect of "new technologies" on the television industry, and I encourage the members of the Committee to review it. CBS begins with a rather skeptical view of the FCC's entire premise:

> "The term 'new technologies' is thought to represent a revolution that is about to burst upon the world of communications -- particularly that portion of it called 'television.'"

The ensuing 35 pages are devoted to a persuasive analysis showing, in CBS's words, that "nothing has changed," and in fact that very little will change. CBS projects that in 1990, the networks will still have a 70% share of the national prime time audience (and that they will actually be reaching a larger audience in numbers than in 1980). Moreover, in 1990, the networks will still "reach audiences more than twice as large as all other sources combined." Thus, in 1990, according to projections by CBS, the networks will still be the "gatekeepers" to the national audience, just as they have been since 1953.

In another publication, "The Video Marketplace in 1990: Diversity and Growth in Perspective," CBS reaches similar conclusions. Thus, in 1990, the ten then-existing cable networks will earn $200 million each, while the networks are earning $5 billion each, not including the earnings of their affiliates. Of course, if the networks are allowed to purchase their affiliates, that $5 billion figure will increase substantially. Moreover, CBS notes that "network television has proved eminently adaptable -- absorbing new technologies as they emerge," and that, by 1990, "the predominant share of television audiences, and the bulk of advertising revenues, will continue to be where they are today."

The other networks agree. John Severino, the President of ABC Television, told the Broadcast Advertising Club of Chicago in late 1982:

> "I think we have to come to terms with a fundamental reality . . . to accept the fact that network television is our only truly national medium . . . a medium with such enormous reach that it has assumed a unique place in our lives."

And Severino plainly does not expect this "unique" national "reach" to change:

> "I don't think anyone seriously questions that cable is going to find a place in the broadcasting spectrum. But let's be realistic in our expectations and perspective. Total cable advertising last year amounted to less than two-tenths of one percent of all television advertising revenues, which is a real measure of the size and dimension of cable audiences."

Severino said that network television will reach the "mass market"

> "as it does today -- providing value to advertisers at costs that cannot be equalled by any other medium. Even if you take the most pessimistic forecasts of the three-network share of Amiercan households in 1990, network broadcasting will still reach more people every day than it does in 1982."

In a 1982 press release, NBC announced that its "state of the media" data showed that

> "Today, the commercial television networks are the largest and most dynamic entertainment, information, and advertising medium to ever exist. And they will remain

the dominant commuciations medium of the future."

So the Commission's suggestion that there have been such dramatic changes in television that network dominance is no longer an issue is simply wrong. The questions the Commission and this Committee should be asking are "how can we facilitate more competition for the networks?" and "how can we open up the national market to more voices and more competitors?" Instead, the Commission, because it pretends the networks are just so many other players in an open market, asks simply "why should we keep regulating?"

* * * *

The third point I want to emphasize is that the FCC, in deciding to repeal restrictions on network ownership of stations, has totally misunderstood the marketplace it is empowered to regulate. Reading the FCC's Report and Order, one would think that television was an unregulated, open market, subject to immediate entry by anyone with money and initiative. That sort of treatment simply ignores the entire history of television, including the three networks' base of more than 600 affiliates, reaching half-again as many viewers as any fourth network could even hope to reach.

The extent of the three networks' dominance is easily seen from a few simple figures taken from statements by the networks themselves. According to CBS in "The Road to 1990," in 1981, network affiliates (including O&Os) reached 38,400,000 prime time homes. All other broadcast sources, including cable and over-the-air, reached 10,600,000, slightly more than 1/4 of the networks' reach. Thus, in nearly 75% of the television homes in America, the only "competitors" were the three networks. Not surprisingly, the same CBS publication shows the networks capturing 80% of the national prime time audience.

The effect of this dominance both in terms of homes reached and actual audience share is simple. If a program supplier, producer, or writer wants to reach a national audience -- indeed, if he or she wants to reach even a significant share of it -- he or she *must* get the program on a network. Similarly, an advertiser seeking a national audience has no choice but to place its advertisements on a network. Moreover, because there are *many* suppliers of programs and even more advertisers, the three networks are in an ideal position to exploit their positions as "gatekeepers." Classic economic analysis tells you that a small number of buyers (the networks buying programs) has *greater* market power when there are many sellers; and a small number of sellers (the networks selling ad time) similarly fares best against a large number of buyers.

Indeed, the evidence is substantial that the networks have consistently been able to exploit their regulated market power. For example, in the 1970's, the United States Department of Justice twice (first during the Nixon Administration and then the Ford Administration) filed antitrust complaints against the three networks, alleging that each had combined with its 200+ affiliated stations and used its control over access to the national audience to restrain and monopolize the television market. In 1977, the Department of Justice submitted to the United States District Court an "Identification of the Evidence in Support of the Government's Contention That CBS and ABC Have Violated Sections 1 and 2 of the Sherman Act." In that document, the Department summarized the voluminous evidence it had accumulated showing the networks' abuse of their regulated market power, including: (1) that each network had used its nationwide claim of *government granted monopolies* (in the form of television stations) to monopolize network television entertainment programming; (2) that the networks used their monopoly power to eliminate competition by non-network broadcasters; and (3) that the networks always know precisely what each other is offering with respect to prices, terms, and conditions for programs, and that each offers similar prices, terms and conditions. Attached to this testimony are copies of the Government's "Identification of Evidence," along with other documents concerning these networks antitrust cases, which show clearly the networks' use of their market power to exclude competition. In particular, please take time to read the ABC Stipulation of July 21, 1976, an *admission* by ABC of the extensive parallel practices of the three networks.

The history of FCC and judicial regulation of television begins with this understanding of the power granted to the networks by virtue of their chain of affiliates. The Commission and the courts have consistently perceived the need to place limitations on the networks' *use* of their market power, because the nature of television prevented them from "breaking up" the networks' "monopoly" in the form of the "network" itself. As the Justice Department eloquently stated in its Competitive Impact Statement, supporting the consent decree in *U.S. v. CBS*, in *1980*,

> "The proposed judgment is directed at minimizing the substantial advantage CBS has acquired in television programming because of *its market power as one of the three nationwide commercial networks*, which not only purchase and exhibit but also produce television programs. *The structure of the market is such that each of the three networks controls program producers' and advertisers' access to the nation's commercial television audiences, and each network has abused its power* by refusing access to programs which it did not produce or in which it had no financial interest. Consequently, *the only meaningful relief that can be obtained short of restructuring the networks* is to limit network program production and restrict the

> program rights that each network may obtain
> from outside suppliers. . . ."

45 Fed.Reg. 34467, at 34468-69 (May 22, 1980). Similarly, the FCC has placed some limitations on the networks' control over their affiliates -- restricting the networks' ability to *require* the affiliate to show a network program, limiting the length of affiliation contracts, and restricting the dayparts in which the network may program for the affiliate. The purpose of these limitations, as the FCC has long recognized, is to preserve some *diversity* and some *competition* among a network and its affiliates, and to leave "cracks" in the networks' otherwise *total* control of access to national audiences.

These regulations and the consent decrees have had some success. Affiliate clearance rates are lower than O&O clearance rates; the Prime Time Access Rule has made it possible for independent program producers to reach larger audiences; and the Financial Interest and Syndication Rules and consent decrees have allowed a highly competitive program production market to develop and have protected the young years of independent television stations. It is *only* because of these restrictions on the networks that any of this has happened -- but now, in a misguided attempt to take advantage of an era of "deregulation," the FCC proposes to "deregulate" the networks' uses of their market power *without* changing the regulated *structure* of the industry.

Nevertheless, the FCC remarkably seems not to understand the significance of the network-affiliate system itself. The FCC proceeds as if network *ownership* of a station is the *same* as network *affiliation* with a station. In fact, the differences are crucial. Affiliates, because they are *not* owned by the network, and because the FCC historically has guarded their independence, contribute to *diversity* and to *competition*. They participate in ad hoc program networks, fostering the growth of independent programming; they program, independent of network management, various parts of the broadcast day's schedule; and they sell "spot" advertising time to local and national advertisers. They do all of this because they have economic interests which are different from those of the networks.

Indeed, affiliates actually compete with the networks in several ways. An affiliate makes money from two sources: fees from the network for showing -- or "clearing" -- a network-fed program, and revenues from selling local or "spot" advertising time. On network programs, most of the ad time is sold by the network; the affiliate may only get to sell a couple of 30 second or minute "spots." If the affiliate thinks it can make more money by "pre-empting" -- that is, not "clearing" -- the network program, and selling more "spot" time on a non-network program, it will do it. Thus, even in prime time, an affiliate may be "competing" with the network. Then, of course, the affiliate also programs other day parts -- independently from the network.

Network-owned stations are different, because what is good for the network, is good for the O&O! Hence, network O&O's like KNBC in Los Angeles "clear" 100% of the network feed, unlike affiliates. By acquiring affiliates, therefore, the networks can maximize their profits in two critical ways: first, they can increase their "clearance" and hence their total audience, and thereby increase their network advertising revenues; second, they can foreclose others -- producers and advertisers -- from access to the station -- they could, for example, prevent an affiliate which preempted a network program to show "The Jesse Owens Story" as part of an ad hoc network, from ever doing anything similar again -- and by foreclosing access, they can make it less likely that ad hoc networks will develop to support national independent programming or national spot advertising. Thus, they could kill in its infancy the only competition they are likely to face in the near future. Contrary to the FCC's seemingly rose-colored view of network acquisition of stations, therefore, networks will have substantial incentives to acquire as many stations as possible, and that acquisition process will have devastating effects on competition and diversity.

* * * *

Finally, my litigation experience teaches me one last, very clear lesson: that the FCC's assurance that the Department of Justice and Commission can prevent anticompetitive acquisitions and practices by the networks on a "case-by-case" basis is totally unrealistic. The government's antitrust cases against the networks in Los Angeles make this point crystal clear. In that litigation, ABC stipulated that, at the very least, the networks engaged in consciously parallel behavior -- that each network immediately knows what prices and terms the others are offering, and offers the same. The economic effect of this sort of "conscious parallellism" -- lack of competition on prices and terms -- is of course the same as if the networks had expressly colluded, fixing prices. But that sort of parallel behavior -- which is both predictable and proven in the network-controlled television industry -- presents an enforcement problem: how do you prove it? And, if you can, is it prohibited by the antitrust laws? In other words, once you have created a structure which leads to "collusion" and restriction of competition, it is likely to be almost impossible, and certainly very expensive, to detect and prevent the collusion and restriction on a "case-by-case" basis. The only way to ensure free competition is to adopt a clear, prophylactic rule preventing the structure favoring collusion from emerging.

The government took 8 years to litigate the network antitrust cases -- and they never even got to trial. We can expect that any effort to restrain illegal network acquisitions of stations or anticompetitive practices by the networks will be met by the same obstacles and the same lengthy proceedings. Neither the Justice Department nor the FCC is equipped to monitor network acquisitions and practices all over the country in the manner contemplated -- at least not without substantial increases in their staffs and budgets.

And even if they could do it practically, neither the DOJ nor FCC should be put in that position. How would they decide when to challenge an acquisition and when not to? Will they daily be making decisions about whether there is enough "diversity" in a market or too little? Will they decide whether a network would do "better" programming than an existing owner -- as the FCC purports to do in its Report and Order? Will they inquire into news judgments to see whether network O&O's are operating news departments independent from the network news?

Those kinds of "case-by-case" decisions, involving highly subjective judgments about control of broadcasting outlets, threaten far too much to permit government officials, doing their assigned jobs, to trod on First Amendment values. A clear, prospective prohibition against network acquisitions will avoid all of these problems, protecting both competition and diversity without creating even more regulatory bureaucracy and expense.

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Thank you for giving me this opportunity to share my views regarding the Seven Station Rule. I hope that you will recognize that all the danger lies on one side: giving the networks more stations and more power may well permanently close the television industry to all but three companies; not giving them that power now simply provides the opportunity for new competitors and voices to flourish.

REPEAL OF RESTRAINTS ON NETWORK OWNERSHIP WILL INCREASE CONCENTRATION AND ANTI-COMPETITIVE PRACTICES: A CRITIQUE OF THE FCC REPORT AND ORDER REGARDING THE SEVEN STATIONS RULE[1]

I. The FCC Report And Order Is Based On Incorrect Premises Regarding The Television Market And Incomplete Analysis Of The Anticompetitive Effects Of Increased Network Ownership Of Stations.

The Federal Communication Commission's analysis of the competitive effects of repeal of restrictions on network ownership of local broadcast stations is based upon the premise that changes in the television industry "have eliminated monopolistic control as a serious threat," and that the only barrier to entry into television broadcasting is "insufficient capital".[2] The Commission's analysis thus fails to take into

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[1] This paper was prepared by Munger, Tolles & Rickershauser, counsel to the Committee Against Network Dominance, for presentation to the Judiciary Committee of the United States Senate.

[2] Report and Order, BC Docket No. 83-1009, 49 Fed. Reg. 31877 (August 9, 1984) (hereinafter "Order") at ¶ 7. Although the Commission otherwise relies almost entirely upon the market analysis submitted by the Antitrust Division of the Department of Justice, the Commission's basic market assumptions are totally inconsistent with the Department's findings only last year, in January 1983. In its Comments regarding the Financial Interest and Syndication Rules, the Department stated that "the network television industry is highly concentrated [and] barriers to entry are high"; that "the networks [are] 'gatekeepers' of national broadcast television"; that "[t]he networks have engaged in many parallel practices"; and that, at least in the context of program supply, "the Department is not confident that the antitrust laws can be relied upon as the most effective tool

(footnote continued on next page)

account the most important facts about the structure of the television industry.

A. The FCC Spectrum Allocation System Creates A Highly Concentrated And Closed Television Market In Which Alternatives To The Three Networks Are Practically Impossible.

The key element in the current market dominance of the three networks is the spectrum allocation adopted in 1953.[3] Under that system, even if all allocated television assignments were operational, only 133 of the 212 local television markets in the country would have four or more commercial stations assigned. With currently operating stations, a new network could reach only 63.6% of total television households vs. 96.5% reached by CBS, the smallest of the three networks in terms of

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for ensuring against possible anticompetitive network practices. . . ." Comments Submitted by the Department of Justice in BC Docket No. 82-345 (January 1983), pp. 39-40. The Department further determined that "it is by no means certain that [the] new media will eliminate network dominance," and urged the Commission not to give the "new media" much significance in making its regulatory decision. Id., p. 46.

[3] Federal Communications Commission Network Inquiry Special Staff, Final Report - New Television Networks: Entry, Jurisdiction, Ownership and Regulation (1980) (hereinafter "FCC Network Inquiry Final Report") at I-40 to I-64.

audience.[4] Moreover, of those operational stations currently available to become members of a fourth network, a substantial number are UHF stations which are at severe technical disadvantages to VHF competitors.[5] This makes the emergence of new national or regional networks practically impossible.[6] The structure of a series of government-defined local markets with a fixed number or entrants also makes application of the Herfindahl-Hirschmann Index (HHI), used by the FCC to estimate concentration in the national market, totally meaningless.[7]

1. The Foundation Of Network Dominance Is Ownership And Operation Of Five VHF Television Stations In Major Markets And Affiliation With More Than 200 Other Stations.

Network power and control of nationwide television are solidly based on ownership of five VHF stations in the major markets, which provide each of them with direct access to 20% of all television homes, and affiliation nationwide with more than 200 other stations (predominantly VHF), enabling each network to reach virtually 100% of all television homes in the country. With ownership of outlets to almost one-third of the national audience, and with contractual relationships with more than 200 other stations, networks obviously enjoy an enormous advantage over other potential national distributors. As discussed below, expansion of the number of network-owned stations will have two effects which will increase network dominance: first, it will give the networks even greater assurance of access to a national audience, and second, it will foreclose those stations as potential outlets for other distributors.

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[4] Id. at I-41 to I-47.

[5] UHF affiliates suffer from reception and tuning disadvantages compared with VHF stations. See FCC Network Inquiry Final Report at I-57.

[6] Id. at I-75 to I-76.

[7] See Order at ¶ 74; Comments of CBS Inc. in BC Docket No. 83-1009 at 20-21.

2. The Growth In The Number Of Independent Stations Has Not Significantly Diminished Network Dominance.

The Commission concluded that the growth in the number of independent television stations since 1953 has significantly increased diversity.[8] Although the FCC correctly notes that the absolute number of independent television stations has increased over this period, the fact remains that network dominance of programming has continued in spite of this development. As CBS itself admits, "[m]ost of this growth [in the number of stations] has been in UHF stations."[9] As the Commission itself has consistently acknowledged, UHF stations face considerable technical handicaps that can be overcome only as "UHF operators . . . incur substantially higher costs [than do VHF operators]."[10] Further, UHF faces significant "receiver" handicaps which make UHF viewing less desirable than VHF viewing.[11] Largely for these reasons, the growth of independent stations has not offered significant competition to network programming. Indeed, one thorough economic study concluded that, in spite of such growth, the networks continue to "decide what most Americans see most of the time."[12] Thus, the networks "still have about 80 percent share of [the national] audience,"[13] and the networks now supply significantly more of the programming hours between 7:00 a.m. and 2:00 a.m. than they have at any earlier time.[14]

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[8] *Order* at ¶¶ 4, 34-35.

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[9] CBS Broadcast Group, "The Road to 1990" (a copy is attached hereto as Exhibit 1).

[10] FCC Network Inquiry Final Report at I-50.

[11] See id. at I-51 to I-55.

[12] ICF Incorporated, An Analysis of the Impacts of the Repeal of the Financial Interest and Syndication Rule (filed with the FCC in BC Docket No. 82-345) (hereinafter the "ICF Report") at 1-8.

[13] Id. at 1-10.

[14] Id. at 1-9 to 1-11. Thus, the ICF Report notes:

> "In 1960, networks supplied 55 percent of the programming hours between 7:00 a.m. and 2:00 a.m., Sunday to Saturday; by 1970, it was 61 percent; by 1980, 69 percent--even with three

(footnote continued on next page)

3. "New Media" Will Not Offer Significant Competition To Network Programming In The Foreseeable Future.

The Commission concluded that the emergence of "new broadcast technologies" and the growth of cable television currently offer competition to network programming.[15/] A brief review of the facts, however, suggests strongly that such alternative programming sources will not offer significant competition to network programming for the foreseeable future. Moreover, repeal of the Seven Stations Rule may fundamentally alter the broadcasting industry so as to hinder the emergence of these alternative programming sources, thus solidifying the networks' dominant position in the industry.

There is little dispute that alternative program sources have to date made very limited intrusions into the broadcasting industry. Cable, by far the most developed of the new technologies, has reached a national market penetration of only

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> hours of entertainment programming effectively precluded by the Prime Time Access Rule. As networks continue to increase network feed on the weekends, this number will rise still further."

Id. (footnotes omitted).

[15/] *Order* at ¶ 35.

38%,[16] as compared with over 95% penetration by the networks. Moreover, the entire cable industry in 1983 produced only $13 million in advertising revenue; the networks' revenues in 1983 were $5.7 billion.[17] Other technologies cited by the Commission are even further dwarfed by the networks. For instance, low power television "faces considerable delay because of the backlog of thousands of applications and the difficulty in dealing with mutually exclusive cases."[18] Video cassette recorders had reached a market penetration of only 3% in 1983,[19] and the videodisc "faces a difficult road in home distribution."[20]

Indeed, although the Commission suggested that the new technologies currently offer significant competition to the networks,[21] it elsewhere conceded that, with the exception of cable, the new technologies are "now in their infancy."[22] Thus, the FCC acknowledged that the only relevance of the new technologies was to the Commission's "attempt to evaluate the future of the broadcast and cablecast market and of the new technologies and services."[23] Rejecting arguments that it was premature to make substantive changes prior to the actual emergence of new technologies, the FCC insisted that "it is entirely appropriate" for the Commission to predict the future of the industry.[24]

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[16] Broadcasting, Sept. 5, 1983, at 19.

[17] Television Digest, Vol. 24, No. 31, pp. 1-2.

[18] Geller, FCC Media Ownership Rules: The Case for Regulation, 1982 J. Comm. 148, 152.

[19] Id.

[20] Id.

[21] Order at ¶ 7.

[22] Id. at ¶ 35.

Because the new technologies are in their infancy, any prediction of the rate and degree of their expansion is necessarily very speculative. Even if the possible emergence of this technology were relevant, the Commission overlooked three critical factors in concluding that the new technologies will compete with the networks in the foreseeable future.

First, the Commission's projection of the new technologies' growth is contradicted by the networks' own predictions of the future of the broadcasting industry. Thus, CBS's analysis of the market in 1990 concludes that "[t]he networks will reach audiences more than twice as large as all other sources combined."[25] CBS therefore projects 1990 revenues of $15-20 billion for the networks -- even excluding affiliate revenues -- as opposed to revenues of only $8-11 billion for all cable sources combined.[26] ABC similarly estimates that total local and network television revenues will reach $35 billion by 1990, with cable taking only about 20% of that.[27] NBC also predicts that the networks will continue to dominate the broadcasting industry:

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[23] Id. at ¶ 40 (emphasis added).

[24] Id.

[25] The Road to 1990 at 20.

> Optimism for the future is based . . . on three fundamental reasons: cable has not demonstrated its viability as a mass advertising medium and, therefore, [is] dependent on direct viewer support; commercial networks enjoy superior distribution (a three-to-one advantage over cable); and commercial networks have a continually expanding viewer base, which is the most important measure of success to an advertiser.[28]

Second, the Commission failed to consider that the new media reflect expansion by the networks themselves as much as they may give rise to competition against the networks.[29] Thus, for instance, CBS has embarked on a joint venture with AT&T in viodeotext, has already received FCC approval for a direct broadcast satellite, and owns a cable system in Dallas. Similarly, ABC has acquired ESPN, a leading cable sports network, and has embarked on major joint ventures in the cable market with

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[26] Id. at 32.

[27] Speech by John C. Severino, President, ABC Television, at Broadcast Advertising Club of Chicago, November 17, 1982, at 9. (A copy is attached hereto as Exhibit 2.)

[28] NBC Press Release, May 17, 1982.

[29] See Channels 1984 Field Guide to the Electronic Media (January 1984).

Cox Cable Company and Hearst. NBC has also received FCC approval for a direct broadcasting satellite service and currently operates satellites engaged in cable and television services. In addition, NBC operates "The Entertainment Channel" on pay cable and is seeking to enter both the videotext and low power television markets.

Finally, the Commission's projection overlooks the fact that repeal of the Seven Stations Rule may facilitate monopolistic steps by the networks that will hinder or preclude the development of the new technologies. As explained in Section II, *infra*, repeal of the rule will enable the networks to secure greater market control and will permit network foreclosure of alternative programming. These developments, in turn, may well hinder or even preclude the development of the new technologies, whose future will of course depend heavily on access to new programming and advertising revenues. In short, repeal runs the danger of precluding the very technological developments that are cited in support of the *Order*.

B. *The FCC Ignores The Important Differences Between Network Affiliation And Network Ownership Of A Station*.

The Commission has also failed to consider the important differences between affiliation of a local station with a network and network ownership of the station. Much of the regulation promulgated by the FCC over the past forty years has been designed to limit the networks' ability to abuse their regulated market power, by creating and protecting competition between the networks and their affiliates. Thus, because affiliates purchase programs for dayparts which are not scheduled by the networks, they compete with networks for programs; similarly, because affiliates sell "spot" advertising (and the networks are prohibited from representing them), they compete with networks in the sale of advertising time. Moreover, the *potential* for competition from an affiliate, which always exists because the network does *not* own the station and cannot compel clearance of network programs, places constraints on the networks.

Network acquisition of affiliates would eliminate this actual and potential competition in both the program acquisition and advertising markets. As discussed below, elimination of such competition would give the networks both additional power and incentive to foreclose non-network access to national audiences and to engage in various anticompetitive practices in the advertising and program markets. The networks therefore will have a substantial incentive, as well as the capital resources, to purchase as many additional stations, reaching the largest possible audiences, as they are permitted. As a result, the development of *ad hoc* networks and national spot advertising will be stunted, the availability of stations for purchase will be restricted, and the barriers to entry into broadcasting will be raised even higher.

II. Increased Network Ownership Will Increase Concentration And The Likelihood Of Anticompetitive Practices.

A. The Advertising Market.

1. Increased Network Ownership Will Restrict Competition In The National Spot Market And Permit The Networks To Increase Network Advertising Rates.

The Commission, adhering to the comments submitted by the Department of Justice, concludes that repeal of restrictions on network ownership of stations would not have anticompetitive consequences in either the network or "spot" advertising markets. In doing so, however, the Commission fails adequately to consider the relationship between national spot advertising, whereby a national advertiser places local spots on stations in many markets, and network advertising.

Through the national spot market, local broadcast stations offer their advertising time for sale to national and regional advertisers, generally through intermediaries known as national representative ("rep") firms.[30] While national spot advertising is still in its emergent stage, it operates as an important competitive restraint on network advertising prices, offering advertisers an alternative means to reach at least a share of the national audience when network prices rise too high.[31] Thus, one benefit to be gained from increased non-network group ownership, as the Commission recognizes, would be to "reduce the transactions costs of assembling wide area coverage via the spot market, and actually put more pressure on network rates."[32] However, permitting the networks to acquire

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[30] See Statement of Peter H. Lemieux, Ph.D., attached hereto as Exhibit 4 ("Lemieux Statement").

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[31] Indeed, the Lemieux Statement demonstrates that national advertisers increasingly perceive national spot advertising as a potential substitute for network advertising. Thus, Dr. Lemieux shows that in recent years several large advertisers have shifted significant shares of their advertising expenditures from network to national spot advertising. Moreover, many advertisers have explicitly stated that, in response to higher network advertising prices, they would shift at least some of their advertising expenditures to national spots.

The Department of Justice itself acknowledges that national spots operate as a price constraint on network advertising:

> "The cumulative cost of buying spot advertisements in all markets plus the transaction costs of purchasing such coverage is an upward limit on the price that can be charged for network advertising. Moreover, most large advertisers buy large amounts of both network and spot advertising."

Department of Justice Comments submitted in BC Docket No. 83-1009 at pp. 15-16.

[32] Order at ¶ 102. The Commission acknowledges the relationship between national spot advertising and network advertising, but only to the extent that relationship supports repeal. The Commission adopts the arguments of program suppliers and independent station owners that national advertising support is essential to the development of independent programming which will be able to compete

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additional local stations will significantly restrict competition in the national spot market, resulting in higher prices for both national spot time and network advertising time.

This is true because, as mentioned above, affiliates compete with networks for advertising dollars, whereas network-owned stations do not.[33] Affiliates can sell more spot time

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with the networks. Id. at ¶ 57-59, pp. 20-21. As the Commission states:

> "Under the numerical proscription rules, the group owner can be assured of only seven outlets for its product. The result of this disadvantage is that the national advertising market takes on a high degree of importance for group owners [and others seeking to develop independent programming]: by obtaining national advertiser support for their independent programming, they can afford the production costs and compete with the networks." Id. at ¶ 58 (second emphasis added).

To the extent that "national" programs supported by national spot advertising would compete with network programs for audiences, the national spots themselves would of course compete with network advertising for those same audiences.

[33] "National advertisers buy both network and 'national spot' commercial time. In the national spot market, the stations compete with their own (and other) networks. Network ownership of large-market O&O stations thus gives the networks an increased share of the overall advertising market."

Owen, "Structural Approaches To The Problem Of Television Network Economic Dominance," 1979 Duke L.J. 191, 221, n. 167 (Feb. 1979); see also Owen et al. Television Economics, 93-94 (1974) (discussing substitutes for network advertising).

on non-network programs, although they lose the clearance fee from the network if they replace a network program; thus, when an affiliate believes it can make more revenues from, for example, eight minutes of spots on a non-network program than it can from two minutes plus a clearance fee for a network program, it may refuse to "clear" the network program.[34] As the Network Inquiry Special Staff found:

> "[S]eparate ownership means that network and station are likely to engage in strategic behavior in order to increase their respective shares of joint profits with the result that some jointly profitable network programs may fail to be cleared."[35]

Network-owned stations, by contrast, have no conflicting interests with the networks, because network profit is the only relevant criterion. Hence, a network-owned station would have no incentive to preempt a network program to show a non-network program. The Network Inquiry Special Staff confirmed this analysis empirically, finding that network-owned stations in fact have a significantly higher clearance rate than do affiliates and that affiliates in large markets preempt more network programs than do affiliates in smaller markets, because they can get larger revenues from spot time in those larger markets.[36]

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[34] See S. Wildman, "Vertical Integration in Broadcasting: A Study of Network Owned-and-Operated TV Stations," in Federal Trade Commission, Proceedings of the Symposium on Media Concentration, Vol. I (1978) (a copy is attached hereto as Exhibit 5).

[35] FCC Network Inquiry Final Report at 247.

Indeed, the networks have a substantial incentive to restrict the availability of spot time on their owned-and-operated stations. By doing so, they would be able to raise the price of national spot advertising, thereby relieving the competitive pressure on network rates. For precisely that reason, the Commission years ago prohibited the networks from representing their affiliates in the sale of spot advertising time. In 1959, the Commission determined that "[n]ational spot, of all the alternative means of advertising, is the closest substitute for networking," and that network representation of affiliates in the spot market therefore significantly restrained competition:

> "As competitors of their affiliated stations for national television advertising, the networks have conflicting interests in their affiliates' national spot rates. Their interests are twofold: (1) to reduce the competition which the network may receive from national spot for the business of national advertisers; and (2) to protect network rates by reducing any disparity with national spot rates."[37]

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[36] Id. at 264, 266, Tables VI-5, V-31.

[37] Network Representation of Stations in National Spot Sales, 27 F.C.C. 697, 716, 1520 (1959) (emphasis added). Although the networks argued that they represented too few affiliates to influence spot rates nationally (NBC represented 11 stations, including its 5 O&O's, and CBS represented 12 stations, including its 5 O&O's at the time), the Commission found that

"this argument ignores the fact that at least

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Permitting the networks to acquire their affiliates will enable them to restrain competition in the advertising market in these same ways, undoing the Commission's reasoned regulatory scheme of more than 20 years.

Thus, as the number of network-owned stations increases, the availability of spot time to national advertisers will be reduced. Because the networks are most likely to buy stations in the largest television markets, and because network stations generally attract the largest shares of a market's audience, the

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> one of the purposes of raising national spot rates is to get other stations in the market and other affiliates of the network to follow suit . . . . Thus if spot rates can be raised on the affiliated stations represented by the networks, this can serve as an example to other affiliates."

Id. at 1521. Particularly significant to the Commission *in* this regard was NBC's acknowledgement that it manipulated the spot rates for its O&O's to this end:

> "The networks have used their owned and operated stations in this manner. Thus, in a 1954 rate review, NBC stated that a "major effort" by the network at reducing the differential between spot and network rates should be deferred until, inter alia, the spot rates of its owned stations could be used as examples. *NBC later indicated that adjustments in spot rates by its owned stations were particularly helpful in substantially improving the relationship generally between network and spot rates*."

Id. at n. 19 (emphasis added).

available audiences for national spots will be even more substantially reduced. Indeed, it is possible that in some markets, such as Houston, each of the viable broadcast stations would be owned by the networks, foreclosing national spots almost entirely in those markets. The networks, by purchasing affiliates in large markets, could thus make it extremely difficult for any advertiser to reach a significant share of the national television audience, by any means other than on the networks themselves.

If the networks are allowed to forelose national spots in this way, the cost of national spot advertising will rise, the networks will be able to raise network advertising rates without any check, and the hope for development of national programming and advertising to compete with the networks will be extinguished.

a. Increased Network Ownership Will Facilitate Collusion Among The Networks In National And Regional Spot Advertising.

The danger of collusion among the three networks in both national spot and local advertising is also virtually ignored by the Commission, although the networks' ability and incentive to collude has been demonstrated in the past.[38/] In fact, increased network ownership of stations would enhance both the opportunities and the incentives for network collusion in the advertising market.

One key to successful collusion is the ready availability of information and policing mechanisms to protect against secret cheating, such as price-cutting. The more local markets in which the networks face each other as owners and operators of local stations, the greater access they will have to immediate and detailed information about each other's advertising and programming actions, and the easier it will be for them to correct their own behavior or penalize deviations. In addition, the networks' ability to collude successfully to raise network advertising rates will increase as they acquire control of a larger proportion of spot audiences in all markets. Network advertising rates are constrained by the aggregate of spot rates in individual markets, not merely by the spot rate in any individual market. Thus, the larger the share of the

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[38/] For example, during the Government's prosecution of the three networks for monopolizing prime time programming, ABC stipulated that it had "become quickly apprised of the prices, terms and conditions offered by . . . CBS and/or . . . NBC," acted on that information and offered substantially the same prices, terms and provisions as did CBS and NBC, which were the terms and prices finally agreed on. Stipulation of Facts filed by the Department of Justice in United States v. American Broadcasting Companies, Inc., Case No. 74-3600-RJK, United States District Court for the Central District of California, filed July 21, 1976. (A copy is attached hereto as Exhibit 6.)

aggregate national spot audience the networks control, the more they will be able to control the overall cost of national spot time.

The incentives as well as the opportunities for network collusion in setting advertising rates will increase with expanded station ownership. The networks receive an indirect benefit from increased local spot rates -- the higher limit on maximum network rates -- even where they do not reap the entire benefit from additional revenues from spot time itself. As owners, however, the networks would receive 100% of local advertising revenues now retained by affiliates. Thus, increased station ownership would permit the networks to reap all the benefits from both higher local spot rates on their own stations and their resulting ability to raise network rates.

2. The Program Acquisition Market.

The Department of Justice has consistently recognized that the market for acquisition of prime time entertainment programs is highly concentrated, with only 3 buyers, and that the program supply market is "competitive."[39] Under these conditions, those most favoring the exercise of oligopsony power, it is not surprising that the networks have repeatedly been found to have engaged in parallel, anticompetitive practices in the program acquisition market.[40/] Permitting the networks to acquire additional television stations will further increase concentration in the program acquisition market and the incentives and opportunities for network collusion.

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[39] *E.g.*, Department of Justice Comments in BC Docket No. 82-345 (January 1983) at pp. 39-40.

a. Ownership Of Additional Stations Will Enable Networks To Foreclose Access For Non-Network Programming.

Affiliates operate as independent competitors in the program acquisition market, while network-owned stations do not, for several reasons. First, as discussed above, clearance rates on affiliates are less than 100%, both in prime time and daytime,

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[40/] Id. at p. 41. In its antitrust cases against the three networks, the Department offered evidence in 1978 which it claimed demonstrated numerous parallel practices by which the networks attempted to reduce competition and increase their own market power in the program acquisition market. "Identification of the Evidence in Support of the Government's Contention That CBS and ABC Have Violated Sections 1 and 2 of the Sherman Act," filed in Cases No. 74-3599-RJK and 74-3600-RJK, United District Court for the Central District of California (a copy is attached hereto as Exhibit 7). The Court found that the Department's evidence "would be more than sufficient, if adduced at trial, to enable a jury to reasonably find against the defendants on a Section 2 charge," at least with respect to monopolization by each network of its own prime time entertainment. Memorandum of Decision and Order in Cases No. 74-3599-RJK and 74-3600-RJK, United States District Court for the Central District of California at 15 (filed October 26, 1978). See also Competitive Impact Statement filed by Department of Justice in United States v. CBS, 45 Fed. Reg. 34467 (May 22, 1980) (a copy is attached hereto as Exhibit 8).

because affiliate interests diverge from network interests.[41] Second, affiliates program those parts of the broadcast day which cannot now be programmed for them by the networks, including the "Prime Time Access" period, whereas a network controls programming for these dayparts on network-owned stations. Thus, affiliates are potential outlets for ad hoc networks and potential buyers for non-network programs, while network owned-and-operated stations are not.

As network ownership of stations increases, therefore, the opportunity for development of alternative program formats, such as ad hoc networks, will decrease, as will the likelihood of a fourth network. The Commission itself has recognized the danger to competition inherent in that situation: "Station ownership by networks may make it easier to foreclose the entry of competitive program sources if owned stations can more easily be induced not to carry programs from these sources than can affiliates."[42]

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[41] Network-owned stations clear 100% of network-supplied programming, whereas affiliates clear only 97% in prime time and 87% during other day parts. ICF Report at 1-14; FCC Network Inquiry Special Staff, Preliminary Draft: An Analysis of the Network-Affiliate Relationship in Television, VI-9, Table VI-2 (October 1979).

[42] FCC Network Inquiry Final Report at II-247.

b. Increased Network Ownership Will Facilitate Collusion To Control Off-Network And Independent Programs.

The Commission has not considered in its Order the potential effect which increased network ownership of stations would have on the syndication market and hence on independent television stations. While the networks are currently prohibited from controlling syndication rights, the networks' campaigns to eliminate the financial interest and syndication rules and to repeal restrictions on station ownership are closely related, because network ownership of more stations would increase the incentives and opportunities for networks to control the availability and price of programming available for off-network broadcast.

As explained in detail in the ICF Report submitted in FCC Docket No. 82-345, if the networks were permitted to control syndicated programs they could capture additional income from independent stations through either of two anticompetitive practices. Increased network ownership of stations would increase the likelihood of the networks' engaging in either of these practices. First, the networks could raise advertising rates on network programming and on their owned-and-operated stations. This would lead some advertisers to shift to independent stations and increase the value of programs to those stations. The monopoly network could then raise the prices for its programming and increase its profits. Increased station ownership would enhance the effectiveness of this strategy for the networks, because their ability to raise advertising rates would increase as they acquired more local stations.[43/]

Alternatively, the network could inflate the price of off-network programs by withholding or "warehousing" some of them. This would lead some independents to buy less or lower quality programming, reducing those stations' audiences, which would in turn reduce the station's advertising revenues. The resulting increase in demand for advertising on the affiliate or network-owned station would allow that station to increase its "spot" advertising rate and its revenues. The networks' incentive to engage in this strategy would significantly increase if they were permitted to acquire more local stations, because they could then capture all of the additional revenue from increased "spot" advertising on network-owned stations, rather than merely a share of increased affiliate revenues.[44/]

[43/] In its Comments regarding the financial interest and syndication rules, the Department of Justice stated that "[t]he ability of the network monopolist to affect advertising rates may increase its incentives to reduce the supply of viewers delivered to advertisers by withholding programs." DOJ Comments in BC Docket 82-345 (January 1983), p. 37.

[44/] In its reply comments in Docket No. 82-345, the Department of Justice itself agreed that the networks' incentive to withhold programs to affect advertising rates would increase "if they were able to capture all of the profits themselves." *Id.*, p. 21.

To maximize their ability to utilize either of these strategies, the networks can be expected to continue to pressure the Commission to repeal the financial interest and syndication rules[45] and seek to lift existing limitations on internal production of network programs,[46] to which they may retain syndication rights. Viewed in unison, the networks' campaigns against the financial interest and syndication rules, to increase internal production, and to repeal limitations on network station ownership can only be seen as a coordinated effort to integrate themselves in such a manner that they will be able to exclude virtually all significant competition from the television industry.

3. The Networks Will Have Unique Incentives And Ability To Acquire Local Stations.

The FCC has asserted that networks will not pay more for a station than other prospective purchasers. In fact, the networks will have unique incentives to buy local stations in order to restrict competition with network advertising and programming, and they will therefore be willing and able to buy stations in large markets at prices that other buyers, group or non-group, cannot match.

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[45] Networks may be able to capture some of the benefits of program ownership by acquiring sufficient control over off-network programs, such as long-term options or licenses, broad exclusivity terms and other rights, to approximate the control they could exert by outright ownership.

[46] Network internal production is currently limited through November 4, 1990 only by Final Judgments entered in United States v. National Broadcasting Company, Inc., United States v. CBS, Inc., and United States v. American Broadcasting Companies, Inc., Cases No. CV 74-3601-RJK, CV 74-3599-RJK, CV 74-3600-RJK, United States District Court for the Central District of California.

As discussed above, the networks are oligopsonists in the purchase of programs and oligopolists in the sale of advertising time: they are 3 buyers facing many program suppliers and 3 sellers facing many advertisers. However, their ability to exploit this market power is somewhat limited by two critical regulatory conditions: first, the networks cannot control the "mix" of network and spot advertising on local stations, so that advertisers can to some degree restrain network advertising prices by purchasing or threatening to purchase national spots; and, second, the networks cannot control independent programs, the only competition for their network programming.

Network ownership of more local stations would essentially eliminate these limitations in the program acquisition and advertising markets, by giving the networks additional opportunities and incentives to control the availability and price of national spot advertising and programming. Because only the networks possess market power in the present network programming and advertising markets, only the networks will have the unique incentive to _extend_ that power by purchasing local stations. Accordingly, the networks are likely to pay higher prices for local stations, particularly in large markets which are particularly significant for national spot advertising and *ad hoc* networking.[47]

B. Increased Network Ownership Will Not Result In Any Pro-Competitive Efficiencies.

The FCC concedes that, unlike increased ownership by other groups, "*network* ownership of additional stations would not have the advantage of stimulating additional nationwide programming (since the networks already provide a full schedule)."[48] Any pro-competitive programming alternatives will only arise to the extent that *non*-network groups increase their ownership so that they are able to purchase quality first-run programming for their own stations as well as offering them to other stations to be broadcast in competition with network programming. As explained above, this development would be seriously inhibited by permitting the networks to own more stations.

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[47] A further factor favoring the networks as buyers, and tending to limit the prices offered for stations by other prospective purchasers, is the "affiliation" factor. Because the estimates of net revenue used by each prospective buyer to determine an offering price will necessarily be based on certain assumptions, buyers who can control more variables are at an advantage. Only one class of buyers -- the networks -- will be able to determine whether a station will become or remain an affiliate, and also determine whether other stations in the market will become or remain affiliates. Thus, a station may be more attractive to a network buyer than to other prospective buyers.

[48] *Order* at ¶ 105, p. 37 (emphasis added).

As a result, the networks have been forced to rely instead on supposed "management efficiencies" as a positive justification for permitting them to own more stations:

> "They claim that their stations are particularly well-managed and provide an unusually large amount of local programming. Thus, they imply that it would be beneficial if their superior management skills and organization were spread over more stations."[49]

There is no evidence to suggest that superior management skills are confined to network-owned stations, however. Indeed, the success of group-owned stations and independent stations (which in many cases are singly-owned and suffer under a UHF handicap) is concrete evidence that management can do a "superior job of matching programming to local tastes and thus garner larger audiences"[50] without being part of a network. Many managers may also be part-owners of single stations, rather than paid employees of a group, and thus feel a deeper sense of commitment to the station and its audience.[51]

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[49] Order at ¶ 105.

[50] *Id*. at ¶ 82.

[51] Indeed, the "better hired managers" idea runs counter to the Commission's emphasis on the "integration of ownership into management" criterion in deciding between competing applicants for new full power broadcast facilities. *See Policy Statement on Comparative Broadcast Hearings*, 1 F.C.C. 2d 393, 395-96 (1965).

III. CONCLUSION

If the networks are permitted to acquire more local broadcast stations, they will have the incentive and resources to do so. The effect of those acquisitions will be to increase concentration in the television industry, substantially facilitate anticompetitive practices by the networks, and impede the development of new competitive forces in the market. On the other hand, there are no significant efficiencies to be gained through increased ownership of stations by networks, as opposed to other group owners. Thus, competition in the television industry will be significantly reduced, without any countervailing benefit, unless the FCC modifies its *Report and Order* to prohibit further network acquisitions.

ATTACHMENT 1

The Road to 1990

CBS/BROADCAST GROUP

The term "new technologies" is thought to represent a revolution that is about to burst upon the world of communications -- particularly that portion of it called "television."

But the anticipated "revolution" is really an evolution whose processes are already well underway. And measured.

The Nielsen Company has been reporting data on viewing to the "new technologies," under the heading of "major sources of television programming," since November of 1979. These are the signposts on the road to the 1990 world of communications. The Nielsen definitions of "major sources of television programming" follow.

Major Programming Sources

Network Affiliates	-- the local outlets for network programming.
Pay Cable	-- the programs cable subscribers pay for over and above the cost of the basic cable subscription -- HBO, Showtime and so on.

Major Programming Sources

Cable Originated	-- what is usually called "basic cable," but here limited to programming specifically designed for cable (as against commercial television programming carried on cable). This category includes cable networks, such as CNN, ESPN, USA, as well as local cable programming (but not the pay services notes above).
Other On-Air	-- the "non-network" broadcast universe of independent and PBS stations plus so-called "superstations" (WTBS, WOR, WGN).

Note: the estimated combined penetration of the two sources of "in home" programming, video discs and video cassette recorders is 15 to 20 percent of television homes by 1990. To date, by far the heaviest usage of VCRs has been for time shift viewing.

Of course, not all of these sources are available to all television households.

There are three different kinds of television homes, each defined by the program sources it is able to receive.

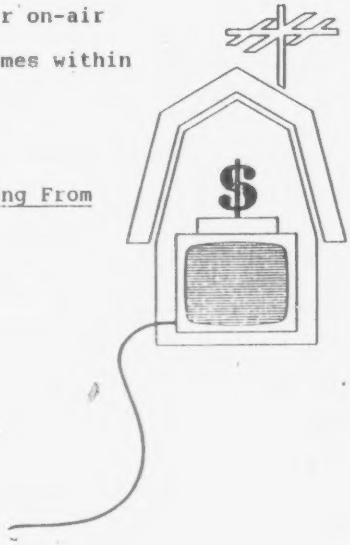
Home #1

This home is able to watch programming from all four major sources.

However, it should be noted that whereas all three networks have access virtually to all homes with television sets, no single pay cable, cable originated or other on-air source has access to all the homes within its own universe.

Can Receive Programming From

- Network Affiliates
- Pay Cable
- Cable Originated
- Other On-Air

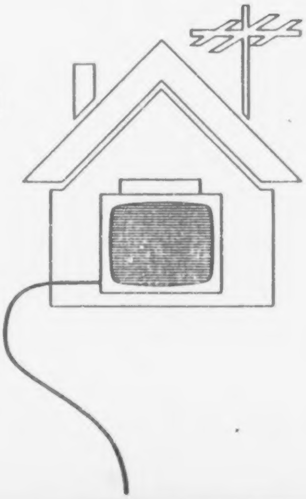


Home #2

Similar to Home #1, except it doesn't buy pay cable. It is generally felt that most future cable homes will sign up for pay. Therefore, the number of "basic only" homes is not likely to increase very much.

Can Receive Programming From

- Network Affiliates
- Cable Originated
- Other On-Air



Home #3

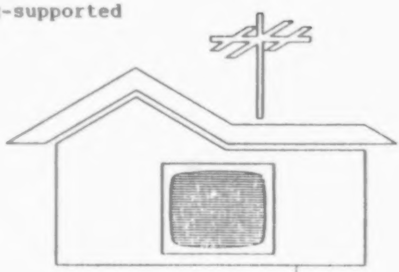
This is the "non-wired" home -- the home that receives only whatever over-the-air signals its antenna will pick up.

About 40 percent of the country's television homes are expected to remain in this category at least through 1990 (a fact that has an important bearing on the potential of advertising-supported cable).

Can Receive Programming From

Network Affiliates

Other On-Air

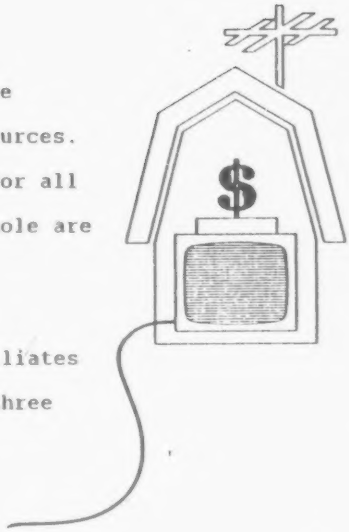


Note: Since this home is not wired, the other on-air category in this case does not include so-called superstations.

As noted, The Nielsen Company has been providing data on viewing to all four sources, in all three types of homes since November 1979.

This competitive history is shown on the following pages as prime time share of audience for each major source.

Share is a simple way to make comparisons -- but an important qualification attaches to it: share alone says nothing about audience size. Relating these shares to actual audience delivery requires another calculation. This will be done further on.

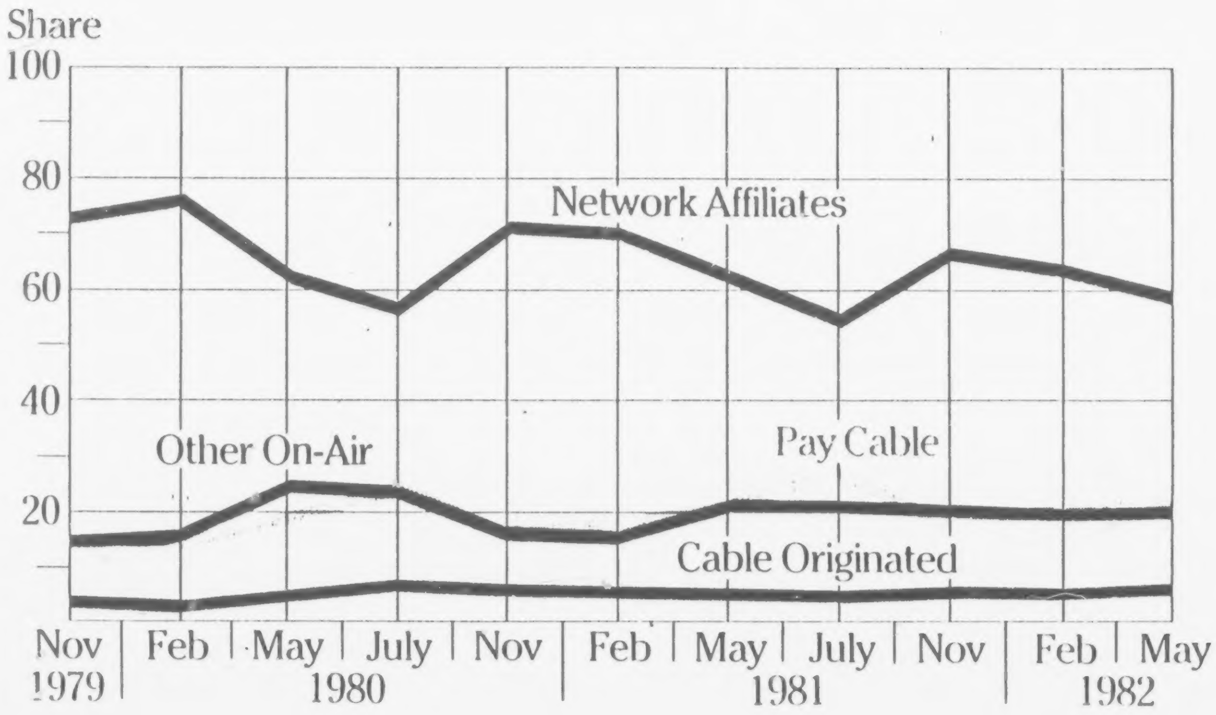


Home #1 is the most intensive competitive situation, since it receives all four sources. While there are seasonal ups and downs for all the sources, the relationships on the whole are reasonably stable.

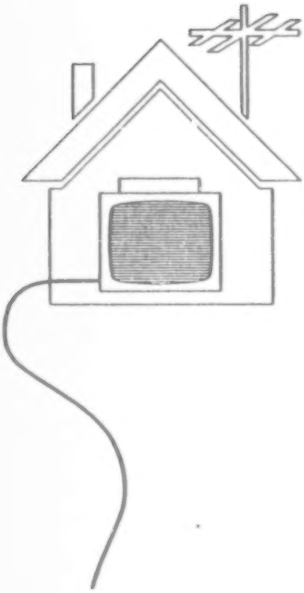
And here, as in every case, network affiliates are by far the leading source -- about three times as big as the nearest competitor.

Prime Time Share Of Audience

Home #1

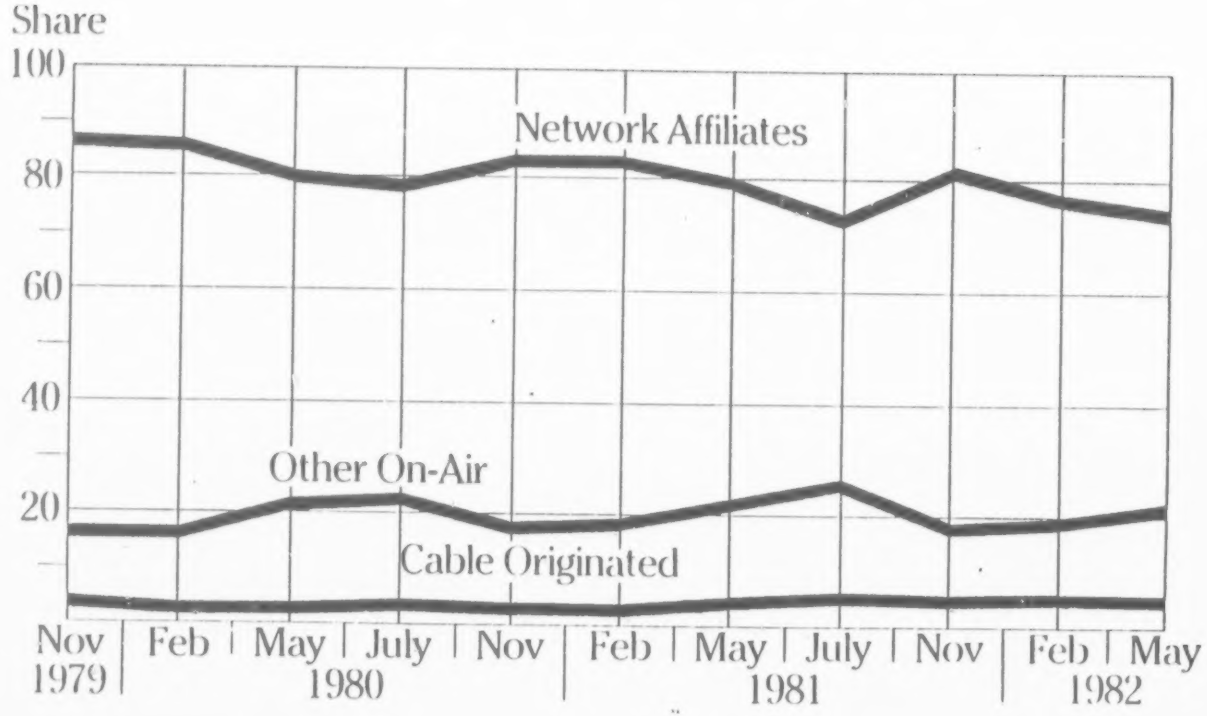


In Home #2 (wired but without pay cable) the lines are somewhat flatter, with network affiliates about four times as large as the second source, other on-air.

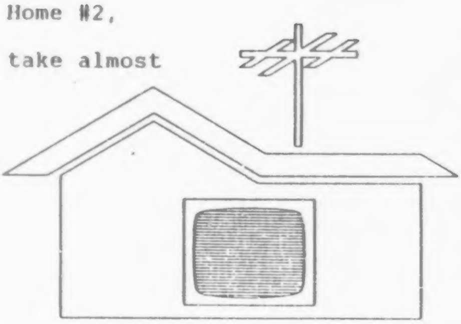


Prime Time Share Of Audience

Home #2

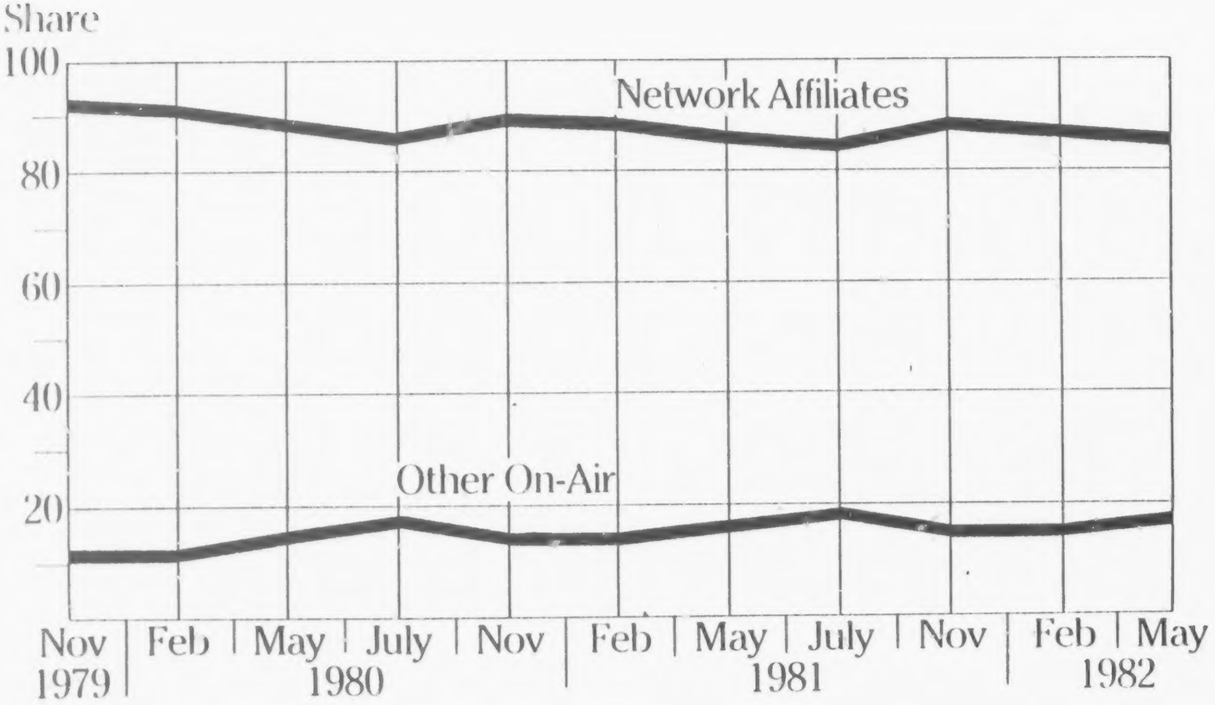


In the non-wired home, Home #3, the pattern is quite similar to Home #2, but here network affiliates take almost 90 percent of the audience.



Prime Time Share of Audience

Home #3



It is necessary to repeat over and again: Network O & O's never preempt primetime network programs. Therefore the more network O & O's, the less competition exists to the networks. If you allow networks to increase the number of their O & O's, you decrease competition.

IV. "FREE" TELEVISION IS IN NO DANGER OF BEING SUPPLANTED BY PAY CABLE OR PAY TELEVISION

The FCC Chairman has publicly stated that one of the most compelling reasons for unleashing the networks from their current station restrictions is to insure the survival of free television. The Chairman implies that without network expansion of station ownership, somehow pay services will eat up free television.

There is a bit of "deja vu" here. This is the very same argument employed by CBS's attorney before the FCC in 1975, speaking in opposition to FCC proposals to relax rules restricting pay cable. The FCC rejected the network argument then. It should reject the same argument now. Both arguments leaped from false premises to wrong conclusions.

We do not know where the Chairman got his 'facts.' They are wrong.

Today, ratings and shares, that is, the arithmetic of how many people are watching what, opens one's mind to but one conclusion: networks and other TV stations are doing just fine. Cable is not.

Ratings:

The ultimate fact is what people watch on their television screen.

Here is a catalogue of current primetime viewing (Monday-Sunday, 8:00 pm/11:00 pm), during November, 1983 in all television households and in non-cable, basic cable and pay cable homes: (In ratings, that is % of all TV households in each category -- and shares, the percent of all sets in use at a specific time.)

	All TV Households		Non-Cable Households		Basic Cable Households		Pay Cable Households	
	Rtg.	Share	Rtg.	Share	Rtg.	Share	Rtg.	Share
Networks	51.4%	80%	53.8%	89%	48.4%	76%	48.1%	67%
Indep/PBS	11.1	17	10.3	17	12.9	20	11.5	16
Pay Cable	3.8	6	--	--	--	--	13.6	19
Non-Pay Cable	2.7	4	--	--	5.4	8	6.7	9

(Share exceeds 100% because of simultaneous viewing in multi-set households.) Source: A.C. Nielsen Co.

As a matter of fact, in pay cable households, the networks' share of primetime viewing increased from 65% in November 1982 to 67% in November 1983, according to Nielsen.

Understand what these numbers truly mean in the real world of home viewing.

In the face of over 35 million homes wired to cable and some 23 million pay cable homes, network programs confront these newcomers and are thoroughly supreme. Home viewers "vote" by landslide numbers for network programs.

CBS confirms this view of the present and the future.

CBS Research Division supplied forecasts for a CBS Broadcast Group advertisement which ran in the New York TIMES on February 16, 1984. In this ad, CBS said the following: "Under the pressure of new and lively competition, CBS has actually increased its audiences. In 1983, with more choices than ever, more homes turned to the CBS Television Network than ever before in its history."

Moreover, CBS also predicts it will have a larger audience in numbers in 1990 than it does right now. CBS believes, not without warrant, that cable services will not triumph over network programs and news; indeed, cable services will, they believe, make only a small dent in network audiences.

To further amplify CBS' optimism about the impact of "new technology" CBS Research peered into the future and forecast that by 1990 this would be the line-up of "shares" of audiences:

Networks:	70% Share
Independent TV Stations:	12% Share
Pay Cable:	9% Share
Basic Cable Originated Options:	9% Share

What can one conclude from this recounting?

It is this: Programming, not the delivery system, is the key. To the customer it really doesn't matter how the material coming through the cable channel got to his home. That is not what interests him. Viewers don't watch channels, they watch programs. It is not so surprising then that the networks command the viewers attention since the networks alone have the affiliated apparatus and the financial resources that feed and nourish the highest quality, high budget programs that are most likely to win the favor of the largest number of television viewers. That is the simple truth. It is the way the market operates, a realism with which the FCC chairman seems listlessly unaware.

How are the pay cable services doing? Is it true as the FCC Chairman has stated that free television is now infirm and ready to be taken over by pay services whose allure to paying customers is growing larger and more attractive?

The Chairman's view of the pay cable industry is "out of sync" with the facts. Multichannel News reported, on July 23rd that "for the first time in seven years, Time, Inc.'s video group comprised of Home Box Office and American Television and Communications, failed to show an increase in profits over the previous year's quarterly results . . . Time does not break out individual figures for HBO and ATC, but a number of analysts suggested HBO's profits were down as much as 18 percent over last year's quarter." An article in the July 30th issue of Cablevision states that "officials of Walt Disney Productions reported the Disney Channel lost some $8 million in the third quarter and about $28 million in the first nine months of the fiscal year."

Revenue and subscriber growth for pay cable are running some 50 percent behind expectations for the year. "Churn" (subscribers who cancel) rates for pay cable are running at an annual level of about 45%!

The bleak outlook for Direct Broadcast Satellite (DBS) reflects the contagions visited on potential investors. Company after company has cancelled its DBS plans and aspirations. The resplendent hopes of those who would use this new technology to bypass the networks and their affiliates to supply a new nationwide service are now collapsing. As of now, all but two of the dozen or more applicants for this service have pulled out. After six months of investigation, the CBS Broadcast Group terminated co-venture discussions with Comsat because, according to a senior executive vice president of CBS, "open questions and the risks involved . . . led us to conclude not to decide to enter the business." It is a fact that a network-owned VHF station in a major market is an absolutely risk-free "money machine."

V. THE NETWORKS MAKE HUGE PROFITS FROM THEIR NETWORKING AND THEIR OWNED-AND-OPERATED STATIONS?"

The New York TIMES on July 30 published a resume of an article from TV DIGEST, a respected trade journal. Here is that article.

No one points an accusatory finger at the networks for being profitable. That is their mission and that is what their stockholders charge them to do. Moreover, in our free society, that is a perfectly legitimate and worthwhile objective.

We cite the networks' huge earnings to undergird a most important point: Only the networks have the fiscal muscle, capable of sustained strength, to carry forward a program of station acquisition. Unless General Motors, IBM or some other giant enterprise decided to enter the broadcast business, the networks remain singularly alone in possessing the requisite capital to buy additional VHF stations in larger markets in the land.

The networks are totally unlike all other communications enterprises.

The major "group owners" (Metromedia, RKO, Chris Craft, Gannett, Taft, Cox, Capital Cities, Scripps Howard, etc.) are not "networks" and can never become national networks. They do not possess the reservoir of funds to compete with the networks in station buys in the big markets. The most each can be is a component of "ad hoc" networks. They may be able to produce original entertainment programs, but because of all the surly facts outlined above, they can never achieve consistent national

Published Weekly Since 1945

TELEVISION DIGEST®

The Authoritative Service for Broadcasting, Cable, Consumer Electronics and Allied Fields.

With Consumer Electronics

JULY 30, 1984

VOL. 24, NO. 31

SUMMARY-INDEX OF WEEK'S NEWS

HUGE TV NETWORK PROFITS IN '82-'83: Despite fact it has lost prime-time ratings race to CBS last 4 years, ABC TV Network continued to lead in both billings & profits for 1982 & 1983, according to confirmed results obtained by Television Digest. And, for its owned TV stations, ABC was well ahead of both CBS & NBC in profits & billings.

Here's way networks fared (figures refer to results of TV networks only): ABC had pretax profits of $210 million on $1.861 billion revenue in 1982; for 1983, pretax profits totaled $235 million, revenue $2.073 billion. CBS results: 1982 pretax profit of $170 million on revenue of $1.77 billion; for 1983, pretax profit totaled $190 million, revenue $1.952 billion. NBC figures are harder to come by and following figures are estimates, whereas ABC & CBS results have been confirmed. "As the son of RCA, it's hard to get a good figure on NBC profits. You just don't know what RCA throws in as overhead," analyst who closely follows RCA-NBC told us.

Here's what we've got for NBC: TV network 1982 pretax profit of $25 million on $1.5 billion revenue; 1983 pretax profit of $55 million, revenue $1.7 billion. According to same sources, NBC owned TV stations had 1982 pretax profit of $85 million on revenue of $270 million; in 1983, profit was $100 million on revenue of $310 million. However, another source said: "Your figures on NBC's stations are much overstated, while network profit is too low." Source gave us these figures: TV network 1982 profit $32 million, revenue $1.483 billion, 1983 profit $72.5 million, revenue $1.662 billion; TV stations 1982 profit $75 million, revenue $255 million, 1983 profit $82 million, revenue $285 million. In any case, NBC Chmn. Grant Tinker has announced that TV network performance greatly improved in 1983.

For ABC owned TV stations, 1982 profit was $110 million on revenue of $369 million; 1983 figures were profit $120 million, revenue $410 million. CBS owned TV stations had 1982 profit of $90 million on revenue of $285 million; 1983 figures were $100 million profit on revenue of $310 million.

Network officials & analysts say that ABC continues to lead CBS -- despite losing prime-time race last 4 years -- because of early morning and daytime, where ABC has "better demographics," meaning women 18-35. However, CBS official predicted that would turn around in 1984 -- year in which all 3 networks have reported excellent first half.

Analysts also say network stocks are on verge of upsurge. Value Line Investment Survey rates CBS as its favorite for long-term growth, saying "it has given the clearest indication that it is intent on improving profit margins." ABC stock is ranked "above average" by Value Line, RCA "average," although it says RCA has most to gain from industry's rise in profits.

Note: Television Digest has regularly published network profit & revenue figures since 1964, based on mandatory annual financial report networks filed confidentially at FCC. However, that requirement was abolished after reports for 1980. Last TV network profit story we ran was Nov. 1, 1982 -- which included estimates for 1981, plus chart of actual revenue & earnings for years 1973-80. If you keep TV Digest binder, you might want to update those figures, or if you want copy of 1982 story, call Janice Crawford at 202-872-9200.

network status. The networks know this. Every professional in the business knows this. The only folks who have a vacancy of knowledge of the real world of television are some officials in the FCC. We offer that characterization only because of what they have publicly declared as the reasons why they have unlocked the networks and given them free rein to acquire, own and operate more TV stations in the U.S. marketplace.

The FCC states one of its objectives in the unleashing of the networks is to inject more diversity in the marketplace, and incite more competition to the networks.

There is in that reasoning what can be best described as "a failure to communicate."

VI. DIVERSITY OF OPINION ON TELEVISION: DOES THIS FCC ACTION HELP OR HARM DIVERSITY?

One of the most startling and seriocomic statements to come from the FCC in defense of its action gifting the networks with more power was an assertion by FCC officials that their 10-month inquiry found there were now about "30,000 sources of ideas in the country," including all broadcast stations, newspapers, magazines and other periodicals.

"So," said the general counsel of the FCC in a story printed in the Washington POST July 27, 1984, "if a TV network buys up another station, it will mean you will have 29,999 instead of 30,000. That's not a threat to diversity."

Let us be honest: When you read something like this, you have to stifle a laugh and shake your head in disbelief. (Read the top of page nine of the FCC's Report and Order dated August 3, 1984 and you can actually see this in print.)

One is hard driven to really know if the FCC is exnibiting a heretofore unrevealed sense of humor or if they truly believe this absurdity.

If they do, then it is an instance of presumption hardly surpassed since Marsyas announced himself to be a better flute player than Apollo.

If the FCC equates diversity as evenly divided between a big city network owned-and-operated TV station reaching several million homes and a rural newspaper with a circulation of 5,000 then this is a mindset which would also believe 1,000 aborigines armed with spears are the equal of a 1,000 man force equipped with missiles and machine guns.

How on earth can diversity be served by simply adding to the already immense dominion of the networks? It only means that the network's news division chief can control the news output of another station, and there is now another station in the land that will never preempt a primetime network program to show an independently produced program as part of an "ad hoc" network. It only means that programming and news in whatever city the station is located comes under the governing thumb of the network's management.

Is this more diversity? Or is it a stifling of diversity?

Diversity is the multiplication of voices, not a subtraction. Diversity surely does not mean allowing three networks to gain larger dominion over local and national TV since that increases network intrusion into the local marketplace, and inevitably subtracts from those voices which are non-network.

Diversity is tied, irrevocably, to the First Amendment. The FCC ignored or faithlessly failed to remember this durable truth.

This is what the Supreme Court said in part in its Associated Press decision in 1978: . . . "the public interest standard necessarily invites reference to First Amendment principles . . . and in particular, to the First Amendment goal of achieving the widest possible dissemination of information from diverse and antagonistic sources."

The FCC Report and Order cannot stand upright in the face of the winds that blow from that Court declaration of national communications policy.

The best that can be said of this FCC action is that it has delusions of adequacy.

Diversity also affects competition.

If the FCC chooses to offer more competition to the networks, tacitly confirming the networks domination of programs and news, then why not open up the marketplace to group owners, and hold restrictions on the networks?

How can one try to build up competition to the networks by expanding the reach of the networks? That makes no economic sense, no political sense, and surely no public interest sense.

The FCC treats the networks as if they were blood brothers to the group owners, when in fact nothing could be farther from the truth.

The opportunity for "ad hoc networks" (like the one formed for "THE JESSE OWENS STORY") will be irretrievably lost if the FCC persists in letting the networks expand their ownership of stations in the larger markets. It is a fact of television life -- to state it once more for emphasis -- network O & O's never preempt network primetime programs. The more network O & O's, the more the prospect for group owners to form "ad hoc networks" recedes.

We have cited fact after fact to certify the networks' unusual power, nowhere near being matched by any group owner, or aggregation of group owners.

The FCC has missed the flashpoint of the matter and that is that ABC, CBS and NBC are national networks and the group owners are not. The networks control the biggest markets, in ratings, in advertising revenues, in audiences, in domination of national news and local news, in earnings, both of the networking apparatus and owned-and-operated stations, with profits-before-taxes running to 30% of revenues. What other business can claim that kind of return on sales?

The Association of National Advertisers (an organization of the biggest national and spot advertisers in the country, with much of their budgets in television) states that the networks control some 74% of the "total day" television advertising market. Had Nielsen's 1982 "primetime" figures been used, the networks' share would have been 80% (these data extracted from the ANA's filing before the FCC in docket 82-345, on January 21, 1983).

The ANA also, in this same paper, revealed that in markets where there was a strong independent TV station competing with the networks, the cost per thousand viewers paid by typical advertisers ranged from 20% to 60% lower than the cost paid in markets where there was little or no independent station viewing. The public eventually pays for higher advertising costs.

The networks are not the same as others in the television business.

They must be treated differently and handled with great caution for they and they alone intrude into every market and each day have dominion over what Americans watch on their TV screens. Even the largest group owner does not, cannot and will not.

Moreover the FCC has not and cannot answer the question: How does the public benefit from extending more power to the three networks, through the enlargement of the number of their owned-and-operated stations? How does the public gain from that expansion of network dominance?

From the FCC there is only silence.

VII. NEWS, WHERE PEOPLE RECEIVE IT, HOW THEY GET IT AND WHO GIVES IT TO THEM

In a free society, like ours, we abhor government control of anything. By constitutional fiat we forbid any government unit trampling even the slightest on the First Amendment. It is our most precious right and the one we guard most zealously.

That is why we must compel the FCC to go about its deregulation not with an axe, but with a delicate and sensitive blade. One cannot offer more power to those who already have too much power with little concern or meager foresight as to what that gift may produce which could be lamentable in the nation's long term interests. Power is seldom fatal to the people if it is kept on a short tether. But unleashed, power nourishes a terrible regret when it is too late to remedy the error.

The prime reason to keep a tight rein on the networks is their command of news, and their exhibited power to decide what is news and what is not news, who goes on the air and who does not go on the air in the national morning and evening shows. Remember, some 70 million people watch the three networks' evening news shows every night in the week. Some 125 million people watch TV every day. More people watch TV in one day than see all the movies in the entire country in six weeks!

According to TRENDS AND ATTITUDE TOWARD TELEVISION AND OTHER MEDIA, published by the Roper Organization, between 1959 and 1982 the public's reliance on television for news increased from 51% to 65%!

During that same period the importance of other media as news sources went down: newspapers decreased as a news source from 57% to 44% -- magazines down from 8% to 6% -- radio down from 34% to 18%!

This preternatural public faith in television news is a fact that could unhorse a democratic society, though we pray the public's good sense will always prevail against the artifices of those who underestimate the people.

But, to suppose, as the FCC's opinion brazenly declared, giving free rein to the networks to expand their owned stations, unlatching all restrictions, that this benefits the nation is to embrace a defunct mythology.

The Roper Organization study makes plain how rapidly growing is the power of television news and no TV news is more powerful than network news. To confirm this, one need only to speak with public officials or those who would be public officials and learn quickly how all-encompassing it is and how difficult it is to give rebuttal. The networks own the cameras, the transmission facilities, and most important immediate, automatic access to over 600 stations. You, the citizen or the public official, have no comparable platform from which your voice can be heard.

If one doubted the power of the network news, the airing of the Democratic and Republican conventions laid that doubt to eternal rest.

Three men, the chiefs of the networks' news divisions, unseen by and unknown to the American public, unelected to anything, decided who in that convention was in the camera's eye and who wasn't. The network news divisions dictated the shape of each convention and how much time the networks would give that convention to a national audience. There were no alternatives. (C-SPAN could at most reach only 18 million cable homes.*) Who spoke at what time was shaped by the networks' own design. A revelatory example of that power was unalloyed by any innocence or cry of redemption. It came at the Democratic Convention when the Speaker of the House of Representatives was introduced and began to speak from the rostrum of the convention hall. Almost immediately one network turned its cameras off the Speaker and turned them on their anchorman who calmly carried on a conversation with a network news analyst. The Speaker, third ranking member of the United States Government, was summarily and abruptly dismissed from the national audience in exchange for an insubstantive dialogue between network newsmen, neither of whom has a mandate to represent the people in the framing of political decisions, but who clearly brandish a larger public power than the leader of the majority in the House of Representatives.

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* Keep in mind C-Span is available in cable homes where the networks can also be viewed. "Available" does not necessarily equal "viewing." C-Span's ratings and shares are miniscule compared to the networks.

The same casual regard for elected officials was demonstrated in the Republican Convention when the Republican Leader of the House, Congressman Robert Michel (Illinois) was also blacked out from home viewers by the networks even as he spoke from the convention rostrum

That is power, political power, the power to form political choice.

Moreover the Congress must consider another "chess move" on this communications game board. Should the networks finally gain the permission to buy more stations to own-and-operate, they can, as we have explained, extend their news coverage, which they and they alone direct, to the stations they will now add to their ownership. What happens if and when the Fairness Doctrine is repealed? The FCC chairman has clearly proclaimed that to be his ultimate goal.

With all nationally delivered morning and evening television news now under network control, and with the ability of each network's O & O's to leap into half the TV homes in America, is it possible a network news chief could allow an attack to be made on the air, as part of a news story, on an elected official? And is it possible that when the elected official protested and demanded equal time, he would be politely but firmly shown the door?

One cannot foretell, but it is a prospect that is both wintry and scary, particularly if you are the elected official.

We ask this Committee, and its colleagues in the Senate and the House, to be sensitive to the potential for danger that lies in any kind of loose-fibered managment of the public interest in so vital an area as television communications.

There is within television the possibilities of both a festive and brutal character. We can have the one without the other, but only if we are careful.

It is the duty of the Congress to lay out the perimeters of responsibility for telecommunications in this country, to make sure that ultimate power over what people may view in their homes does not rest in the hands of a very few, no matter how non-threatening those few may appear to be at this moment.

VIII. WHAT DO WE RECOMMEND?

We believe that the objective of the FCC's revised Report and Order should be TO INCREASE COMPETITION TO THE NETWORKS in national and local televsion, to increase diversity of voices in the marketplace, to make it easier, not harder, for ad hoc networking to form, to increase--not decrease, opportunities for minority participation in broadcast station ownership, and to erect an enduring barrier to further concentration of power in national television by never allowing the three networks to increase their ownership of local stations.

From a lively and robust competition, from a widening diversity, come great advantages for the American viewing family.

To achieve that objective, we recommend the following:

1. Keep the current restrictions on the three networks.

2. Consider some relaxation of the rules for non-network group owners that will ease the present restrictions but will protect the public interest against undue concentration.

3. Include within the new rules extra "reach" of U.S. television homes for those non-network group owners who purchase stations with substantial minority interest.

4. Do not 'sunset' these rules. Ever.

EXHIBIT I

This catalogue reveals how group owners could increase the number of stations they own -- at the maximum the FCC had determined -- and well within a "reach of TV households" of, say, 22%. This recounting does not show further increase reach through the purchase of stations with substantial minority interest.

CAPITAL CITIES

STATIONS CURRENTLY OWNED

Call Sign	Ch. #	Market	% of TV Households	Rank
WPVI	6	Philadelphia	2.879	4
KTRK	13	Houston	1.640	11
WTNH	8	Hartford-New Haven	.963	23
WKBH	7	Buffalo	.726	34
WTVD	11	Raleigh-Durham	.666	40

Total VHF (5)...... 6.874%

MARKETS IN WHICH ADDITIONAL VHF STATIONS MAY BE ACQUIRED

Market	% of TV Households	Rank
San Francisco	2.420	5
Washington	1.793	8
Dallas-Ft. Worth	1.719	9
Miami-Ft. Lauderdale	1.369	13
Minneapolis-St. Paul	1.340	15
Denver	1.096	19
Indianapolis	1.010	21

Total VHF (7) 10.747%

CURRENTLY OWNED PLUS POSSIBLE ADDITIONS

Total VHF(12).......................17.621%

CHRIS-CRAFT

STATIONS CURRENTLY OWNED

Call Sign	Ch. #	Market	% of TV Households	Rank
KCOP	13	Los Angeles	5.204	2
KBHK	44	San Francisco	2.420	5
KMSP	9	Minneapolis-St. Paul	1.340	15
KPTV	12	Portland, OR	.955	24
KTVX	4	Salt Lake City	.662	42
KMOL	4	San Antonio	.588	45

Total VHF (5).......... 8.749%
Total UHF (1).......... 2.420%

11.169%

MARKETS IN WHICH ADDITIONAL VHF STATIONS MAY BE ACQUIRED

Market	% of TV Households	Rank
Detroit	1.950	7
Cleveland	1.662	10
Pittsburgh	1.430	12
Seattle-Tacoma	1.348	14
Tampa-St. Petersburg	1.305	17
Indianapolis	1.010	21

Total VHF (6).......... 8.705%

CURRENTLY OWNED PLUS POSSIBLE ADDITIONS

Total VHF (11)........................17.454%
Total UHF (1)..........................2.420%

Total (12)............................19.874%

COX

STATIONS CURRENTLY OWNED

Call Sign	Ch. #	Market	% of TV Households	Rank
KTVU	2	San Fran.-Oakland	2.420	5
WKBD	50	Detroit	1.950	7
WPXI	11	Pittsburgh	1.430	12
WSB	2	Atlanta	1.322	16
KDNL	30	St. Louis	1.231	18
WSOC	9	Charlotte	.744	32

Total VHF (4)...... 5.916%
Total UHF (2)...... 3.181%

Total (6).......... 9.097%

MARKETS IN WHICH ADDITIONAL VHF STATIONS MAY BE ACQUIRED

Market	% of TV Households	Rank
Boston	2.323	6
Dallas-Ft. Worth	1.719	9
Indianapolis	1.010	21
Portland, OR	.955	24
Phoenix	.924	25
San Diego	.875	26

Total VHF (6).......... 7.806

CURRENTLY OWNED PLUS POSSIBLE ADDITIONS

Total VHF (10)......................13.722%
Total UHF (2)......................3.181%

Total (12)..........................16.903%

GANNETT

STATIONS CURRENTLY OWNED					MARKETS IN WHICH ADDITIONAL VHF STATIONS MAY BE ACQUIRED		
Call Sign	Ch. #	Market	% of TV Households	Rank	Market	% of TV Households	Rank
WLVI	56	Boston	2.323	6	Los Angeles	5.204	2
WTCN	11	Minneapolis-St. Paul	1.340	15	Washington	1.793	8
WXIA	11	Atlanta	1.322	16	Miami-Ft. Lauderdale	1.369	13
KUSA	9	Denver	1.096	19	St. Louis	1.231	18
KPNX	12	Phoenix	.924	25	Sacramento-Stockton	1.052	20
KOCO	5	Oklahoma City	.665	41	Indianapolis	1.010	21
		Total VHF (5)..........	5.347%		Total VHF (6)..........	11.659%	
		Total UHF (1).........	2.323%				
		Total (6)..............	7.670%				

CURRENTLY OWNED PLUS POSSIBLE ADDITIONS

Total VHF (11)..........................17.006%
Total UHF (1)..........................2.323%

Total (12)..............................19.329%

RKO GENERAL

STATIONS CURRENTLY OWNED

Call Sign	Ch. #	Market	% of TV Households	Rank
WOR	9	New York	7.704	1
KHJ	9	Los Angeles	5.204	2
WHBQ	13	Memphis	.672	39

Total VHF (3)..... 13.580%

MARKETS IN WHICH ADDITIONAL VHF STATIONS MAY BE ACQUIRED

Market	% of TV Households	Rank
Seattle-Tacoma	1.348	14
St. Louis	1.231	18
Denver	1.096	19
Indianapolis	1.010	21
Baltimore	1.005	22
Portland, OR	.955	24
Phoenix	.924	25
New Orleans	.727	33
San Antonio	.588	45

Total VHF (9).......... 8.884%

CURRENTLY OWNED PLUS POSSIBLE ADDITIONS

Total VHF (12).....................22.464%

EXHIBIT II

VHF stations achieve higher ratings than UHF Stations.

(comparison of ratings and shares of VHF and UHF stations, Monday-Sunday7:00 a.m./1:00 a.m., A.C. Nielsen Co. November, 1983)

	#VHF	#UHF	VHF Rating	UHF Rating	VHF Rating % Advantage	VHF Share	UHF Share	VHF Share % Advantage
ABC Affiliates	143	46	8.4	5.6	50%	25	17	47%
CBS Affiliates	151	30	9.7	7.1	37%	30	21	43%
NBC Affiliates	129	43	8.0	6.2	29%	23	19	21%
Affiliate Total	423	119	8.7	6.2	40%	26	19	37%
Independents	28	116	3.1	1.7	82%	10	5	100%
Total Stations Reported by NSI	451	235	8.4	3.9	115%	25	12	108%

ADDENDUM:

HOW THE NETWORKS GAINED THEIR POWER AND WHY THERE WILL NEVER BE MORE THAN THREE NATIONAL NETWORKS.

To give this Committee a clearer understanding of FCC decision history, here is a brief excerpt from a revealing book by A. Frank Reel, former president of Metromedia Producers Corporation, entitled THE NETWORK: How They Stole The Show, copyrighted 1979. Used by permission of Charles Scribner's Sons.

This extract is from his chapter THE MAKING OF THE MONOPOLY:

Excerpted from A. Frank Reel,
"The Making of A Monopoly",
from The Networks: How They
Stole the Show. Copyright 1979,
A. Frank Reel. Used by permission
of Charles Scribner's Sons.

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The Making of the Monopoly

> *"We have rejected government ownership of broadcasting stations, believing that the power inherent in control over broadcasting is too great and too dangerous to the maintenance of free institutions to permit its exercise by one body, even though elected by or responsible to the whole people. But in avoiding the concentration of power over radio broadcasting in the hands of government, we must not fall into an even more dangerous pitfall: the concentration of that power in the hands of self-perpetuating management groups."*
>
> **—The Federal Communications Commission in 1941**

Two fundamental facts must be understood about the operation of American commercial television: it is a business operated for profit, and there is a limit on the number of available broadcast channels.

There is no need to elaborate on the first point. One should simply keep in mind at all times that television executives are accountable to their investors and stockholders, not to their critics.

It is the second point that is not always appreciated. The unpleasant truth is that there cannot be more than three networks, because there is no place to put them. That is a result of scientific circumstance, but, paradoxically, it need not have been that way.

A television program is transmitted over air waves. Fifty years ago, with the development of commercial radio, it was recognized that private concerns operating at will through the ether created confusion. By 1927 uncontrolled radio transmissions had created such a pandemonium of broadcast blasts and squeals that Congress was forced to act with uncharacteristic haste to halt the anarchy. It created the Federal Radio Commission with full and exclusive authority to license all radio transmitters and require them to adhere to their assigned use of power and hours of operation, and to stay within their channels, or "frequencies." Seven years later that statute was amended and replaced by the Communications Act of 1934, and the name of the administering agency was changed to the Federal Communications Commission. That bureau and that law govern television today.

In the case of radio, the basic problem was one of channeling traffic rather than creating highways. Although certain vested interests succeeded for a few years in restricting the number of radio-transmitting stations, the problem was truly one of allocation, that is, of assigning an available frequency to each applicant in a manner that would prevent physical overlap or involuntary jamming.

Unfortunately, television developed quite differently. Very High Frequency (VHF) transmission, which comprised only what we know as the first thirteen channels, was the sole system perfected and ready when the Federal Communications Commission authorized the first commercial television service in 1941. There was no general use of television for another six years because of the intervention of World War II.

It was during the war that the uses of the UHF (Ultra High Frequency) band became known. A little more than a month after the Japanese surrendered, on August 15, 1945, the FCC considered the possibility of substituting UHF for VHF. It was recognized that the thirteen channels thought to be available in the VHF frequency were insufficient to provide a nationwide service comparable to that available for radio. The proponents of UHF urged delay until they could demonstrate the practical applicability of sets made to receive signals in that band.

Strangely enough, the leading argument for a delay to prove the efficacy of UHF came from the Columbia Broadcasting System. CBS was busily experimenting with color television, using a design that would operate only in the UHF band, and, anxious to establish its technical superiority, it pleaded for the time to prove that its system would work. RCA led the opposition, saying that the time was ripe for the development of commercial television and that deferment would be unwise, especially since the extent of any delay was unknown.

VHF television at that time was entirely black and white; a decade was to pass before color TV would be perfected and sold to the public. But in 1946, UHF was pushed on the grounds that it could provide immediate color television. The FCC considered the problem for over a year. Should we, they asked, have black and white television immediately, or shall we wait the indeterminate amount of time necessary to start out with color television? The broader implications of the larger number of channels available in UHF were a secondary consideration, seldom mentioned.

In March of 1947 the FCC finally made its decision, denying the CBS request for delay and opting for the immediate use of what they described as thirteen VHF channels. It turned out to be a fateful decision, not because of the question of color or delay, but because it limited, perhaps forever, the number of channels, thus creating a television monopoly in the United States. Overnight, millions of television sets capable of receiving only VHF were made and sold, and the companies that were later to control this industry were granted allocations within the thirteen-channel band. This created the vested interests and power combinations that were almost immediately to prove so strong and so important that they eluded any real attempts at control on the part of the public, either directly or through governmental agencies. Little did CBS know at the time how much it gained by losing the UHF argument.

Throughout the discussions and proceedings, all of the interested parties and the members of the FCC had described VHF as consisting of thirteen channels. The final FCC decision to ignore UHF was close, and it is conceivable that it might have gone the other way had the commissioners realized that there would not even be as many as thirteen channels. Within five months, however, it became obvious that channel 1 was unusable. The interference that it caused with various other frequencies made it necessary for the FCC to retire channel 1 to uses not connected with commercial television.

And thereby hangs another bit of irony. For one of the cities to which channel 1 had been allocated was Trenton, New Jersey. The retirement of channel 1 meant that it would be impossible for the state of New Jersey, the eighth largest in the country, to have a VHF television station within its borders, a dereliction which plagues that commonwealth, as well as the members of the FCC, to this day.

The UHF agitation did not die down. In early 1948 the FCC was urged to reopen the allocations for what was now described as "black-and-white UHF." But the fear that such a move would make obsolete all those millions of television sets that had just been manufactured and paid for by trusting citizens was too powerful a deterrent. The FCC stumbled out of the difficulty in October 1948 by announcing a "freeze" on all further allocations. This freeze, which originally was announced to last ninety days, lasted for three and one-half years; it was not until April 1952 that allocations were reopened and the first assignments made in the UHF band. By that time it was, as we shall see, too late. The virtually irrevocable pattern had been established. It was as though the conditions that assure a three-network monopoly had been hardened into concrete that would be impervious to the scratches of the few ineffectual latecomers.

Coincident with its early channel assignments, the FCC announced its policy of localism. Borrowed from radio, this concept limited the creation of powerful regional transmitters designed to cover a broad area in favor of small but more numerous stations allocated on a city-by-city basis. The stated purpose was to maximize the opportunity for local self-expression by communities. Though well suited to radio with its plethora of available frequencies, this policy turned out to be less than ideal for television. Not only was the spectrum limited to twelve channels, but the commission soon learned that to prevent interference each television station using the same numbered channel had to be separated by approximately two hundred miles.

The result is that the great majority of United States cities are served by no more than three VHF stations. There is no way to get any more. New York and Los Angeles are unusual in that each has seven VHF stations. No other city has more than four and there are only thirteen cities, some of which are not extremely large, that have four stations. The populous market areas whose centers are Philadelphia, Boston, Detroit, Cleveland, Cincinnati, Houston, Pittsburgh, Baltimore, Milwaukee, Kansas City, and Buffalo each have three commercial VHF stations, and some others have only two. Hence, it is evident that there cannot be more than three networks (and in some cities a station will actually have to take programs from more than one network) as long as national television is geared to the VHF band.

For economic reasons, as we shall see, almost all network outlets are VHF stations. Because seventy additional channels would have altered the structure of television considerably, it is important to ask why it never happened.

On July 1, 1952, the FCC lifted its freeze and began issuing construction permits for UHF stations. Because of the availability of seventy new channels, the commission put 1,319 UHF licenses on the counter, as opposed to the 556 with which it had exhausted the VHF supply. Many of the new permits which hopeful entrepreneurs applied for were never picked up. Of the 153 UHF stations that actually went on the air over the next four years, 63 went bankrupt, and all but a handful of the remainder shut down in failure—this in an industry of almost guaranteed prosperity, where bankruptcy of a VHF station is literally unheard of.

Why the debacle? In the first place, the UHF stations couldn't get an audience, because most viewers were not equipped to receive their signal. When the FCC announced its allocations freeze in 1948, there were one million receiving sets in the country. When the hiatus ended in 1952, there were seventeen million sets, none of which could tune in to a UHF signal. Four years later that number had increased to thirty-seven million sets, but only 18 percent of them—fewer than seven million—had UHF-receiving capability.

Then, as now, the manufacturing and marketing of television sets was a highly competitive business. A manufacturer could not compete if he added an unnecessary gadget to his more popular models, and the device required for UHF reception was regarded as such a gadget.

The set owner could buy a "converter" for this purpose, but why should he spend the money? What would he get in return? The independent UHF stations weren't able to offer programming that he wanted to see. The UHF station operator was caught in a "chicken or egg" dilemma. Without programming, he couldn't attract an audience; without an audience, he couldn't appeal to an advertiser; without an advertiser, he couldn't get the money to buy programming—even assuming it was available.

In a city where a UHF station tried to compete with a VHF station, a sort of reverse Gresham's law went into effect. A typical example was a city with two or three VHF stations and no more frequencies available on the VHF band. Applicants for additional channels were granted UHF licenses, and when the first one went on the air the market consisted of two or three VHFs and one UHF station. VHF having arrived there first, the viewers had sets that could not bring in the UHF signals. Even where the UHF station was the first to go on the air, and all the local receivers were able to tune in the signal, the later arrival of VHF stations often proved fatal. The VHF stations brought in network programs, and as set sales increased, the UHF station gradually declined. During the four-year period following the lifting of the freeze, sixteen of the thirty-one

UHF stations that had been pioneers in cities later invaded by VHF stations were forced off the air.

The FCC and Congress tried to help the UHF spectrum become viable. The FCC had enforced the rule that no single entity could own more than five television stations. In 1954 it announced a relaxation of that rule extending the limit to seven stations, provided that at least two of them were UHFs. The most important station-group owners were the networks, and almost immediately CBS and NBC tried the experiment of adding two UHF stations to the five VHF stations they already owned. Both networks bought UHF stations in Hartford, Connecticut, which appeared to be a promising area because there was only one VHF station in that city and the nearest VHF competition came from an ABC affiliate in New Haven, forty miles away. CBS also bought the only UHF in Milwaukee, and NBC bought the only UHF in Buffalo. Both networks poured their economic strength and prestige into these operations, but after four years they gave up the ghost. All four stations were sold.

CBS's president Frank Stanton admitted failure: "We put everything we could think of behind management, in terms of facilities, money, promotion, everything else, because I was dedicated to trying to show the world that we could make it work." About the Milwaukee experiment he was more blunt: "UHF simply can't compete with two or more VHF's."

In 1963, Congress tried to help by passing the "all-channel set" law, which decreed that after May 1, 1964, no new TV set could be shipped in interstate commerce (meaning, in effect, that no new set could be manufactured) unless it could receive UHF signals. This helped somewhat; as a result of the all-channel law, UHF was rescued from oblivion and raised to its present status of second-class citizen.

Senator **Hatch**. We will call at this time our first panel. Mr. Edward O. Fritts is president of the National Association of Broadcasters, here in Washington, DC; Mr. Everett Erlick, executive vice president and general counsel of the American Broadcasting Companies, Inc., in New York City; the Honorable Robert Taft, is counsel for Taft Broadcasting in Cincinnati, OH; Mr. Reynold V. Anselmo, who is president of Spanish International Communications Corp., out of New York; Mr. Stanley S. Hubbard, president and general manager of Hubbard Broadcasting Co., in Minneapolis, MN.

We are happy to welcome all of you to this committee. I apologize to all witnesses and people here for going straight through, but I do not have any alternative. I have to be through by a certain time and I think if we do not go straight through, none of you will have the opportunity to testify as such as you would like.

I would like to make a suggestion, if I could. This green light indicates you have 5 minutes, the red light means it is over, and I am not going to strictly enforce that, as you can see. But if we can try and keep our comments within the 5-minute area, I think it helps everybody concerned. We will put all of your full statements, without objection, into the record and that is what we are trying to do is build a record here so that we as Members of Congress will know where we are going on this issue.

We will begin with Mr. Edward O. Fritts and then go to Mr. Erlick.

STATEMENTS OF A PANEL CONSISTING OF EDWARD O. FRITTS, PRESIDENT, NATIONAL ASSOCIATION OF BROADCASTERS; EVERETT H. ERLICK, EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL, AMERICAN BROADCASTING CO., INC.; HON. ROBERT TAFT, JR., COUNSEL, TAFT BROADCASTING; REYNOLD V. ANSELMO, PRESIDENT, SPANISH INTERNATIONAL COMMUNICATIONS CORP.; AND STANLEY S. HUBBARD, PRESIDENT AND GENERAL MANAGER, HUBBARD BROADCASTING CO.

Mr. **Fritts**. Thank you, Mr. Chairman. NAB welcomes this opportunity to participate in the Judiciary Committee's examination of the FCC's station ownership rule modifications. The interest on Capitol Hill generated by the FCC's action has led to a great deal of controversy concerning the significance of the ownership rule change, and NAB appreciates the chance to separate the myths from the reality surrounding the change.

On October 20, the FCC initiated a notice of proposed rulemaking seeking comments on proposals to liberalize its existing seven-station rule. In its initial comments to the FCC's rulemaking, NAB supported the Commission's proposed action and presented evidence to highlight the benefits to programming diversity of liberalizing the ownership rules and to show that radio and television ownership concentration levels are insufficient to support retention of the current limit. NAB did not endorse any particular ownership modification, but argued strongly for relaxation of the ownership rule and for equal treatment of all broadcast licensees.

Generally, while the comments submitted in the FCC proceeding reflected differences of opinion about how the ownership rules should be modified, there was little disagreement that the rules were outdated and in need of change. With respect to radio rules, there was a strong consensus that the rules could be substantially relaxed.

The voluminous record also amply supported the move to expanded ownership of television stations, on two very important grounds:

No. 1, the vast increase in the number of television stations since the adoption of the ownership rules and new competition; and No. 2, the evidence that relaxation of the ownership rules would enable groups to utilize economies of scale in program delivery, compete more effectively with the networks for television audiences, and thereby enhance viewpoint diversity.

The FCC's decision was met with a hue and cry of concern from Hollywood about the "concentration of media" in the hands of a few licensees. MPAA even raised the spectre of a sudden network takeover of television, as if the networks could somehow increase their audience exposure, which is already virtually 100 percent via their affiliates.

In fact, not one single viewer would be added to the network audience as a result of relaxation of this outdated rule.

While we appreciate the policy concerns of this committee, we submit that Hollywood's real concerns are purely business and relate more to the effect of the FCC's decision on broadcast groups, rather than the effect on the networks or on the public.

Larger broadcast groups necessarily erode some of Hollywood's bargaining power in negotiating program packages and enable the groups to underwrite more of their own programming. The skyrocketing cost of programming today gives you an indication of the amount of money at stake and explains the intensity of the Hollywood community's concern.

For example, Mr. Chairman, John Rivers, owner of a single television station, WCSC-TV in Charleston, SC, wrote Senator Hollings in defense of liberalizing the ownership rule, and I quote:

> As of now, there is a proliferation of signals in the marketplace (even Charleston), but the syndicators and the Motion Picture Association are trying to retain and restrict the supply of programming, dramatically increasing the price that we have to pay for the product. If more group owners are allowed to merge and/or create larger distribution outlets, they are more likely to try to develop new programming. The way things stand now, television program syndicators are charging us astronomical fees for the product. Examples: Six years ago we bought M*A*S*H at $600 per title. We just bought the latest episode at $3,750 per title. Gimme A Break, which is not nearly as well directed or written as M*A*S*H, sold for $3,100 per title.
>
> All I am asking is that everyone be allowed to compete fairly. We, as a single-station owner, would infinitely prefer to compete with larger group owners than pay outrageous prices in the current syndicated market.

Ideally, Hollywood would prefer to bargain with each station individually. However, what is good for Hollywood's bottom line is not necessarily good for the American public. And that is really the prime issue we are talking about what is best for the American public.

Larger broadcast groups may very well drive a harder bargain for programming. Larger groups can also produce more of their own programming, a fact that does not sit very well with Hollywood but which promotes programming diversity. Larger broadcast groups can also pool news-reporting costs, such as a bureau here in Washington, a number of which have been established in recent years as groups have attained the revenue base necessary to afford these additional costs.

For example, the Georte Hatch Stations Group of Utah and the Fisher Broadcasting Group of Seattle, WA, have established Washington news bureaus. A Washington news bureau enables broadcasters to bring national issues to the local community, and these expanded news and editorial sources are beneficial to the viewing public.

Among concerns expressed by Congress is the perceived need for the type of audience measurement limitation to be incorporated into the numerical station limit. Broadcasters generally do not oppose an audience measurement limitation in expanding the ownership rules. Moreover, broadcasters do not consider a sunset provision necessary for the public and the broadcast industry to derive benefits of liberalized ownership rules.

We believe that ownership changes will occur slowly. The current trading prices of broadcast stations will insure that. It is also clear that Congress, the Justice Department, and the FCC retain ample authority to redress any problem in the coming years that may arise as a result of the ownership rule change.

You have already expressed your deep concern about this issue, and we are pleased that through this hearing and other appropriate oversight activities of Congress, the FCC will receive the guidance necessary to continue its regulation of the communications industry.

The NAB believes that change in the 31-year-old rule is necessary and that with hearings of this type the FCC can effectuate the changes necessary to promote the public interest and competition in the broadcast industry.

Thank you, Mr. Chairman.

[The following was received for the record:]

Statement of Edward O. Fritts

President
National Association of Broadcasters

on

FCC Multiple Ownership Rule Changes

Before the

Judiciary Committee
United States Senate

September 11, 1984

NAB welcomes this opportunity to participate in the Judiciary Committee's examination of the FCC's station ownership rule modifications. The interest on Capitol Hill generated by the FCC's action has led to a great deal of controversy concerning the significance of the ownership rule change, and NAB appreciates the chance to separate the myths from the reality surrounding the change.

On October 20, 1983 the FCC initiated a Notice of Proposed Rulemaking seeking comments on proposals to liberalize its existing "Seven Station Rule" which limited ownership of broadcast stations to seven AM, seven FM and seven television (no more than five of which may be VHF) stations. The Commission proposed to change the rule in light of the dramatic changes in the communications marketplace during the last three decades the rule has been in effect. The FCC proposal also reflected the belief that allowing broadcast groups to grow larger would enable them to compete more effectively for viewing audiences with the networks, thereby increasing program diversity.

In its initial comments to the FCC's rulemaking, NAB supported the Commission's proposed action and presented evidence to highlight the benefits to programming diversity of liberalizing the ownership rules and to show that radio and television ownership concentration levels are insufficient to support retention of the current limit. NAB did not endorse any particular ownership modification, but argued strongly for relaxation of the ownership rule and for equal treatment of all broadcast licensees.

Generally, while the comments submitted in the FCC proceeding reflected differences of opinion about how the ownership rules should be modified, there was little disagreement that the rules were outdated and in need of change. With respect to radio there was a strong consensus that the rule could be substantially relaxed.

The voluminous record also amply supported the move to expanded ownership of television stations, on two very important grounds:

> (1) the vast increase in the number of television stations since adoption of the ownership rules: an increase from 199 television stations in 1953 when the rule became effective to 1,181 today, and a doubling of the number of independent television stations in the last four years alone. Moreover, today's broadcast stations compete with 6,419 cable systems reaching 35,780,000 subscribers, 104 multipoint distribution systems (MDS) reaching 485,000 subscribers (an additional 16,499 MDS applications are pending before the FCC); 1,314 satellite master antenna systems (SMATV) reaching 240,000 subscribers; and approximately 12 million home video cassette recorders. Direct broadcast satellite (DBS) service is now available in the northeast quadrant of the United States; and finally, the FCC has pending 25,000--30,000 applications for low power TV stations and in the next few years will authorize as many as 1,000 new FM radio stations. These technological developments have substantially increased the number of program delivery systems serving the public.
>
> (2) the evidence that relaxation of the ownership rules would enable groups to utilize economies of scale in program delivery, compete more effectively with the networks for television audiences and thereby enhance viewpoint diversity.

The FCC's July decision was met with a hue and cry of concern from

Hollywood about "concentration of media" in the hands of a few licensees. MPAA even raised the spectre of a sudden network takeover of television, as if the networks could somehow increase their audience exposure, which is already virtually 100% via their affiliates.

While we appreciate the policy concerns of this Committee, we wish to make clear that Hollywood's real concerns are purely business and relate more to the effect of the FCC decision on the broadcast groups than the effect on the networks. Larger broadcast groups necessarily erode some of Hollywood's bargaining power in negotiating program packages and enable the groups to underwrite more of their own programming. The skyrocketing cost of programming today gives you an indication of the amount of money at stake and explains the intensity of Hollywood's concern.

For example, Mr. Chairman, John Rivers, owner of a single station, WCSC-TV in Charleston, South Carolina, wrote the following to Senator Hollings in defense of liberalizing the ownership rule:

> "As of now, there is a proliferation of signals in the market place (even Charleston), but the syndicators and the Motion Picture Association are trying to retain and restrict the supply of programming, dramatically increasing the price that we have to pay for the product. If more group owners are allowed to merge and/or create larger distribution outlets, they are more likely to try to develop new programming. The way things stand now, television program syndicators are charging us astronomical fees for the product. Examples: Six years ago, we bought M*A*S*H at $600 per title. We just bought the latest episode at $3750 per title. GIMME A BREAK, which is not nearly as well directed or written as M*A*S*H, sold for $3100 per title.
>
> "All I am asking is that everyone be allowed to compete fairly. We, as a single-station owner, would infinitely prefer to compete with larger group owners than pay outrageous prices in the current syndicated market."

Ideally, Hollywood would prefer to bargain with each station individually. However, what is good for Hollywood's bottom line is not necessarily good for the American public.

Larger broadcast groups may very well drive a harder bargain for programming. Larger groups can also produce more of their own programming, a fact that does not sit very well with Hollywood but which promotes programming diversity. Larger broadcast groups can also pool newsreporting costs, such as a newsbureau in Washington, a number of which have been established in recent years as groups have attained the revenue base necessary to afford these costs.

For example, the George Hatch Stations group of Utah, and the Fisher Broadcasting Group of Seattle, Washington, have established Washington newsbureaus. A Washington newsbureau enables broadcasters to bring national issues to the local community, and these expanded news and editorial sources are beneficial to the viewing public. Thus, despite the prospect of increased programming diversity for viewers, it is easy to see why Hollywood, to protect its bottom line, will stand in the way of any rule change that creates the prospect of more programming at a lower price.

On August 9, the FCC issued a stay of its ownership decision until next April 1 or until sixty days after the FCC reconsidered its decision, whichever is later. The Commission has indicated it will consult with Congress before acting on reconsideration.

Among the concerns expressed by Congress is the perceived need for some type of audience measurement limitation to be incorporated into the numerical station limit. Broadcasters generally do not oppose use of an audience measurement limitation in expanding the ownership rules. Moreover, broadcasters do not consider a sunset provision necessary for the public and the broadcast industry to derive the benefits of liberalized ownership rules.

We believe that ownership changes will occur slowly. It is also clear that Congress, the Justice Department and the FCC retain ample authority to redress any problem in the coming years that may arise as a result of the ownership rule change. You have already expressed your deep concern about this issue, and we are pleased that through this hearing and other appropriate oversight activities of Congress, the FCC will receive the guidance necessary to continue its regulation of the communications industry.

The NAB believes that change in the thirty-year old rule is necessary and that with hearings of this type the FCC can effectuate the changes necessary to promote the public interest and competition in the broadcast industry.

Senator **Hatch**. Thank you so much, Mr. Fritts.

Mr. Erlick, we are happy to have you with us.

Mr. **Erlick**. Thank you, Mr. Chairman. My name is Everett H. Erlick. I am executive vice president and general counsel of the American Broadcasting Co., Inc. I am pleased to appear before you this morning.

While I appear for ABC, I am authorized to state that CBS and NBC concur in the statement I will present and with a prepared statement which, with your permission, we will submit for the record.

Senator **Hatch**. Without objection.

Mr. **Erlick**. I will abbreviate that statement considerably, in the interest of time, Mr. Chairman, and I would like to ask your indulgence for about 3 minutes before I give you that abbreviated statement to make a very brief response to some of the allegations which Mr. Valenti made just a few moments ago.

Mr. Valenti made three essential points which I would like to summarize and characterize in conclusion. First, he made the point that there is no significant competition in the video industry today which is applicable to television networks as a group, as an industry.

Rather than give you a long-form answer to that, which would be rather easy to do, I will see that each member of the committee gets a copy of this month's Fortune magazine, dated September 17, which has an article at page 156 which obviously we did not write because part of it is definitely not favorable in terms of economic forecasts for this industry.

The article is entitled "The Crowded New World of TV," and it is by a gentleman by the name of Geoffrey Calvin, who has done a great deal of work in compiling statistics and economic data. I suggest that, Mr. Chairman, you and the other members of the committee may want to read this article. It will be, I think, a very adequate answer to the point that there is no competition in the new world of communications for network television.

Senator **Hatch**. I assure you that we will all try and read it.

Mr. **Erlick**. Thank you.

The second point Mr. Valenti endeavored to make was that in the present world there is no real possibility of new entry for program producers, suppliers, potential suppliers for original product for local television, because in some manner we and the existing station groups blanket this market and do not provide adequate entry.

The best answer to that allegation in short form, Mr. Chairman, which I urge you and the other members of the committee to read is the last page of the statement which I have submitted for the record. It is an article from the New York Times of September 6, 1984, which is headlined "Five TV Station Groups to Produce Programs." Five groups, Gannett, Hearst, Metromedia, Storer, and Taft, have agreed to jointly finance new programming that will run for the first time on their own stations and, of course, be made available to any other stations in the United States who wish to sponsor on a local basis.

Now, Mr. Valenti's point that there is no possibility for new entry obviously was not credible to these five companies. These are intelligent, well-managed companies. They are making this entry and investing their hard-earned dollars because they believe in fact that there is a market there. If they did not believe that, they would not be making this entry into the business. So I suggest to you that his statement and summary in that respect is vastly overstated in terms of what these companies have just decided to do.

The third point he attempted to make is that there is no market for Hollywood product among the network owned and operated stations, that there is a complete freezeout, that the gatekeepers, so to speak, would automatically turn down any Hollywood product and that there is no marketplace there and this is a great hardship, a great handicap.

The best short—I will submit more detail for the record—the best short-form answer I can give you and will give you verbally, and then I will give you details further for the record, is that for the past—assuming that Mr. Valenti would make such a statement, because it is not the first time he has made it—over the past 3 years, September 1981 to September 1984, in ABC's five owned television stations we have purchased independently produced syndicated programs, a total of 668 such programs, and that count applies to series and/or specials. In other words, if we bought a Family Feud, for example, that counts as one, not as a strip of five.

I will submit for the record from WABC, WLS, WXYZ, KABC, and KGO data showing the purchase of 668 independently produced programs. That would suggest that again that allegation has been vastly overstated and exaggerated.

Finally, I would suggest to you in response to Mr. Valenti, and then I will quickly summarize our own position affirmatively, that if you remove all of the camouflage and if you remove all the sugarcoating and it was done eloquently—and I congratulate Mr. Valenti for that—what Mr. Valenti and his clients are telling this committee, Mr. Chairman, is that by some strange convoluted process they should be insulated from the normal competitive process in the United States, that their syndicated market, which consists almost entirely of off-network rerun programming, should somehow be preserved without challenge by other producers or by network production or by news or public affairs programs in those local marketplaces.

Now, Mr. Chairman, I suggest to you that this Senate of the United States and this committee does not owe a living to the chieftains of Hollywood or to Mr. Jack Valenti any more than you owe one to the networks. You do not owe us a living. You have certainly not insulated us from the normal ebb and flow of the competition and the marketplace, nor should you do so for the Hollywood producers who are simply before you seeking to protect their own personal private interests in that marketplace.

Now, with your permission, I would like to conclude and summarize my own statement. I do not wish to repeat what has already been said.

I emphasize that the commission instituted its seven-station rulemaking based upon two staff studies, one instituted by FCC Chairman Ferris, the other by Chairman Fowler, both of which recommended that the seven-station rule be abolished. And in the rulemaking both the Department of Justice, which you have heard this morning, and the NTIA recommended that the rule be done away with.

Nonetheless, the Commission's action was much more conservative. It adopted a 12-station transitional limit with a 1990 sunset and, as you know, the effectiveness of the TV rule has been stayed both by the Commission and the Congress pending reconsideration.

The Commission will now reconsider the TV rule, including, we expect, the sunset provision, and possibly whether it should adopt a limitation based on audience reach as well as number of stations. Both the Commission and the Department of Justice have concluded that increased competition justifies a change in the TV rule and that there is no antitrust basis either for keeping the rule or for discriminating against network ownership of additional stations.

The objective studies of commenting parties to which I have referred show that the national television market is highly deconcentrated. They conclude that as a result no national ownership rule is needed. The Department and the Commission emphasize the importance of local competition for which a national ownership limitation is essentially irrelevant.

Other commission rules not proposed for change insure effective local competition, including a network rule which bars the acquisition of any station by a network in a market if local competition would be substantially restrained. I repeat, that rule is already on the books, it does not require further legislative action. If a market, in the judgment of the Commission and in the judgment of the Department of Justice, presented a situation where competition would be substantially restrained by the acquisition of a station either by a network or by a group or by any other party, the mechanism is now there and available to turn down that application. Case by case, it must be considered, it must be acted on and if facts are there which do not justify it, it can and should be turned down.

In that connection, I might also add in response to some of your questions earlier, Mr. Chairman, we would not—should the role be changed, should the Congress after further deliberation and insight and consultation with the Commission conclude that a moderate change in this rule is in order. We, as networks, would not expect to buy independent stations in any market in which we have an affiliate.

Also, as the Commission's decision indicates, it is very doubtful it would approve acquisition of an independent station by a network in a market where that network has an affiliate. The Commission can apply that rule and the Commission rule guards against any reduction in effective local competition.

As a result of the growth of competition, documented in the Commission's decision, the networks are now engaged in the most intense competitive battle in their history. First, networks are intensely competitive among themselves. To this you must add independent television, specialized television, public television, cable, cable networks, premium service networks, MDS, STV and video cassettes. Close at hand are pay-per-view and direct broadcast by satellite.

The three-network share of viewing has declined and will continue to diminish as a result of escalating program and other costs. While viewing declines, network income as a percent of revenues has dropped from 14 percent in 1976 to 8 percent in 1983, as illustrated by the Fortune article which I referred to earlier.

If we were so all powerful as gatekeepers, as Mr. Valenti implies, we would have been able to do a much more effective job in controlling our program costs. Yet every year for the last 25 years network program costs have risen in the marketplace. If we had the economic power in our hands, would we not exercise it? Would we not have at least kept those costs flat or level or maybe even reduced them? The answer speaks for itself.

All studies from objective and disinterested sources have concluded that this rule should not discriminate against networks—the network inquiry staff study of the Ferris Commission, the OPP staff study of the Fowler Commission and the Department of Justice. The major opposition to the ownership of additional stations by networks comes from the six major Hollywood studios which, despite record sales and profits, fear that the acquisition of additional stations will lead to the production of more competitive programming and reduce the market for their network rerun programs.

The Commission found that these objections are based upon private interests and do not represent a proper basis for regulatory action. I suggest to you, Mr. Chairman and other members, they do not represent a proper basis for legislative action.

We have supported a rule based upon a limit on the number of stations. We have had some concerns about the use of a percentage cap based on audience reach. Nonetheless, if the Commission were to devise a reasonable rule based upon a combination of the number of stations and audience reach, in consultation with the Congress, we would support that rule. We believe the Commission should be allowed to proceed with reconsideration and that there is no reason for congressional action at this time.

Reconsideration may result in significant changes in the rule initially adopted and the networks emphasize three points: First, after 30 years of growth and increased competition, some change in this rule is required; second, whatever rule is decided upon, the same rule should apply to all licensees alike; and third, the rule change should not be fashioned in such a manner as to protect the private economic interests of Hollywood program producers.

Thank you.

[The following was submitted for the record:]

SUMMARY OF PREPARED TESTIMONY OF
EVERETT H. ERLICK
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

In 1953, the FCC adopted a rule preventing a single entity from owning more than 7 AM, 7 FM or 7 TV stations, of which only 5 may be VHF. In the ensuing 31 years, there has been tremendous growth in communications and staff studies -- one by the Ferris Commission, one by the Fowler Commission -- recommended the rule be abolished.

A rulemaking was instituted. Comments received from both the Department of Justice and NTIA recommend the rule be done away with.

The Commission decided on a "transitional" limit of 12 AM, 12 FM and 12 TV with a 1990 "sunset." Noting Congressional concern over the new TV rule, however, that rule was stayed until 60 days after completion of reconsideration or April 1, 1985 whichever is later and Congress enacted a similar stay.

The Commission will now reconsider the TV rule including, we expect, the "sunset" provision and possibly whether it should adopt a limitation based on audience reach. While we have supported a rule based upon numbers of stations, if the Commission adopted a reasonable rule based on audience "reach", or a combination of numbers and audience "reach", we would support it.

The Commission and Department of Justice both concluded that increased competition justified a change in the TV rule and that there was no antitrust basis either for keeping the rule or for discriminating against network ownership of additional stations. Major opposition to the ownership of additional stations by networks comes from the six major Hollywood studios which, despite record sales and profits, fear that the acquisition of additional stations will lead to the production of more competitive programming and reduce the market for their programs. The Commission found that these are objections based upon private interests and do not represent a proper basis for the regulation of U.S. telecommunications.

We believe the Commission should be allowed to proceed with reconsideration and that there is no reason for Congressional action at this time. Reconsideration may result in significant changes and the networks emphasize only three points as compelled by the record: (a) After thirty years of growth and increased competition, some change in the television rule is required; (b) Whatever rule change is decided upon, direct or indirect discrimination against the three national networks cannot be justified; and (c) The rule change should not be fashioned to protect the private, economic interests of the Hollywood program producers.

PREPARED TESTIMONY
OF
EVERETT H. ERLICK
EXECUTIVE VICE PRESIDENT AND GENERAL COUNSEL,
AMERICAN BROADCASTING COMPANIES, INC.
BEFORE THE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE

SEPTEMBER 11, 1984

My name is Everett H. Erlick. I am Executive Vice President and General Counsel of American Broadcasting Companies, Inc. I am pleased to appear before you this morning. While I appear for ABC, I am authorized to state that CBS and NBC concur in the statement I will present.

I.

BACKGROUND

In 1953, the FCC adopted the Seven Station Rule which prevents a single entity from owning more than seven AM, seven FM and seven TV stations, of which only five may be VHF. During the ensuing 31 years, the Commission has never waived the rule or otherwise changed it.

Since 1953, there has been tremendous growth and expansion in the communications industry and two major staff studies -- one commissioned by FCC Chairman Ferris (the Network Inquiry Staff Study) and one by Chairman Fowler (the Office of Plans and Policy Study) -- recommended that the obsolete rule be done away with. The Commission, therefore, instituted a rulemaking to consider whether to modify or abolish the Seven Station Rule.

Comments and reply comments were received from interested persons and, at the time of its decision, the Commission had before it a very full and substantial record. Of particular interest, the separate comments filed by the Department of

Justice and the National Telecommunications and Information Agency both recommended that the rule be done away with altogether. This is important to repeat: two FCC studies, the Department of Justice and NTIA all recommended that the Seven Station Rule be abolished.

II.

THE FCC'S DECISION

The FCC decided on August 3, 1984 to take what it called "a cautious first step" and established a "transitional limitation" of 12 AM, 12 FM and 12 TV stations with the expectation that these limitations would "sunset" in 1990 to permit "the agency to take a second look to ensure that total elimination of the rule is fully warranted."

However, noting expressions of concern by some Members of Congress as to the increase in the television station limit, the FCC, on August 9, stayed the effect of that rule change until 60 days after completion of reconsideration or April 1, 1985, whichever is later. Congress subsequently included a provision in an appropriations measure with a similar stay. As the result, the limitation on television ownership remains unchanged.1/

III.

THE FCC'S RECONSIDERATION PROCEDURE

Yesterday was the last day by which interested persons could file petitions for reconsideration directed to the Commission's decision. Although we have not had an opportunity to study these petitions, we understand that a number were filed, including a petition by the Motion Picture Association of America. The Commission's rules allow the filing of answers to these petitions and replies by the petitioners. All papers should be before the Commission by October 15.

This procedure may result in significant changes in the Commission's decision. For example, it is to be expected that the Commission will consider again the question of its 1990 "sunset" for the rules and, possibly, whether an addi-

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1/ The change in the radio rules appears almost noncontroversial and those rules are not discussed further.

tional limitation, based upon audience "reach" or some other audience measurement criterion, should be adopted. While we have supported, as have most broadcasters, a rule based upon numbers of stations, if the Commission were to devise a reasonable rule based upon audience "reach," or a combination of both number of stations and audience "reach," we would support it.

The networks strongly believe that the Commission should be allowed to continue this procedure as contemplated by the Communications Act of 1934 and as envisioned by the Report accompanying the Congressional stay which anticipates consultation with Congress during the reconsideration process.

IV.

THE RECORD BEFORE THE FCC AND ITS DECISION FULLY SUPPORT SOME CHANGE IN THE TELEVISION RULE

The Commission's decision fully considers all issues relevant to the Seven Station Rule. Several major points deserve extended discussion: (A) the growth in competition in telecommunications which has occurred in the last 31 years; (B) whether a rule which discriminates against the three national networks is required; and (C) the opposition to the rule change expressed by the Hollywood program producers.

A. Growth in Competition Since 1953

The Commission found:

-- In 1953 there were 2,458 AM stations compared to 4,747 today; 686 FM stations compared to 4,717 today; and 199 TV stations compared to 1,169 today, an approximate five-fold increase.

-- Since 1953, FM and UHF TV, then struggling, have become fully and vigorously competitive.

-- Since 1953, cable television, TV's most effective competitor, has grown from serving 30,000 subscribers to serving almost 35 million subscribers with its services available to 64% of all television homes.

-- Other sources of programming, non-existent in 1953, now represent the promise of aggressive, additional competition: multipoint distribution service (565,000 subscribers, 16,000 pending applications); satellite master antenna service and STV (2 million television homes); direct broadcast satellite service about to commence; and 12,000 applications pending for low power television stations.

-- Video cassette recorders are now in 8.3 million homes with sale of VCR's projected at 5-6 million per year for the next five years.

The Commission concluded "that in the United States today there are more than 10,000 broadcast stations owned by at least 3,800 different firms; 1,711 daily newspapers, owned by 682 firms; 4,791 cable systems, owned by 1,309 firms; 1,500 consumer magazines, owned by 1,110 firms; 4,742 non-daily newspapers and 4,507 other periodicals owned by innumerable firms."

In light of these very substantial changes and the explosive growth of competition in the broadcast and related fields over three decades, the Commission concluded that some revision in its 30-year old rule was clearly called for and we strongly agree.

Against this background, the decision carefully considers other issues presented: (1) its effect on diversity in programming and (2) economic competition and antitrust considerations. The Commission's answers are: (1) the seven station limitation has not aided diversity in programming and may, in fact, have inhibited the development of competitive program sources and (2) following closely the analysis of the Department of Justice, there are no competitive or antitrust considerations representing a bar to changes in the rule in the national market characterized as "highly deconcentrated."

The Department and the Commission emphasize the importance of local competition to which a national ownership limitation is essentially irrelevant. Commission rules, cross ownership, duopoly and cross interest, in which no changes are proposed, insure effective local competition. In addition, a network rule (§ 73.658(f)) bars the acquisition of any station by a network in a market if local competition would be "substantially restrained" and the Commission's decision indicates it is very doubtful it would approve acquisition of an independent station by a network in a market where that network has an affiliate. Thus, Commission rules guard against any reduction in effective local competition upon modification of the Seven Station Rule. And, in any particular case, the Department of Justice may participate and express its views.

B. Discrimination Against the Three National Networks

The Commission's decision concludes that "the case for treating the networks differently has not been made." We believe that fair competition is necessary to permit continuation of important network public services. We need not catalogue all of those services for this Committee. They are well known: public affairs; coverage of public events, such as national conventions; and sports, such as the recent Olympics, are but a few. We oppose artificial barriers to fair competition, particularly in a telecommunications industry where competition is intense and increasing.

-- As the result of the growth in competition documented above, the networks are now engaged in the most intense competitive battle in their history: first, networks are intensely competitive among themselves; to this, you must add independent TV, specialized TV (SIN), public TV, cable, cable networks (CNN, CBN, USA), premium service networks (HBO, Showtime, The Movie Channel), MDS, STV and video cassettes. Close at hand are pay-per-view and DBS.

-- The three network share of viewing has declined and will continue to diminish. In the early 1970's, the three networks' combined share was over 90% of the prime time audience. By the 1981-82 season, that aggregate percentage had dropped below 80%. Forecasters continue to predict a decline so that, by 1990, it will be between 60% and 70%. Thus, the three network share will have been reduced from an average of about 30% per network to an average of about 20% per network or a little higher.

-- In heavily cabled markets, there is even a more severe erosion. For instance, in Tulsa three network combined shares are 90% in homes with no cable; 74% in homes with 12-channel cable; and 56% in homes with 36-channel cable.

-- As the result of escalating program and other costs, while viewing declines, network income as a percent of revenues has dropped from 14% (1976) to 8% (1981). Program expenditures are increasing more rapidly than network sales.

-- All studies from objective and disinterested sources have concluded that the rule should not discriminate against the networks: the Network Inquiry Staff Study of the Ferris Commission; the OPP Staff Study of the Fowler Commission; and the Department of Justice.

-- Indeed, the acquisition of additional stations, as analyzed by the Department of Justice, OPP and the Commission, is a form of vertical integration like that which is permitted in American industry generally. In this connection, perhaps the Committee will wish to refer to the Comments of the Department of Justice.

Noting that network owned stations are "particularly well-managed and provide an unusually large amount of local programming," the Commission concluded, in light of the foregoing considerations, that there has been "no demonstration that the benefits we perceive from increasing group ownership will be adversely affected by allowing the networks to increase their station ownership." This is, of course, subject to those rules referred to above, designed to safeguard effective local competition, and which prevent a network from acquiring any station if such would "substantially restrain" local competition.

C. Opposition of the Hollywood Program Producers.

Despite the strident opposition to the Commission's rule change as recently expressed in the trade press by the Hollywood program producers, MPAA's submission to the Commission consisted of a brief (8 page) comment. It filed no reply comments. In opposing any relaxation of the television rule in the case of the three national networks, MPAA argued that network owned and operated stations carry less "independently produced" (i.e. Hollywood produced) programming than other affiliates and that the acquisition of additional stations by the networks would reduce the market for Hollywood programming. As the Commission properly concluded, this does not constitute a public interest reason for regulating the networks. The networks acknowledge that their stations do carry more locally produced public affairs and news programs but, as the Commission found: "If owned and operated stations choose to carry more locally produced or station group produced programming than . . . the average affiliate, we have no basis for assuming that this is an anticompetitive or diversity-reducing result."

MPAA's opposition is based entirely upon its private interest and presents no public interest reason for discrimination against the three national networks. The six major Hollywood studios are experiencing record sales and profits from domestic and foreign syndication of entertainment series and feature film programming. The syndicated television re-run market is reported at $900 million per year. Revenues from syndication of "Mash" alone are reported as $220 million and new record prices are being reported for "Cheers." MPAA's opposition to the Commission's proposed rule change is founded entirely upon its desire to have the Government protect this market from competition through increased program production by group owners, including network group owners. In this connection, we call your attention to the pro-competitive program production plans announced by five non-network TV group owners. (See New York Times article of September 6, 1984, attached hereto.) Such efforts would clearly be enhanced by the ownership of a reasonable number of additional stations.

The Commission correctly found that such protectionism does not represent a proper public interest basis for the regulation of U.S. telecommunications.

V.

THERE IS NO NEED FOR CONGRESSIONAL ACTION AT THIS TIME

The record before the FCC provides an ample and persuasive basis for concluding that the Commission's Seven Station Rule, including the television rule, requires revision. The passage of over thirty years; the vigorous growth of the telecommunications industry; and the very substantial competition that has developed in that industry demand an updating of federal regulation.

Specific revision of the television rule is a matter which is now under active review by the FCC in its reconsideration process. Since, as noted, the Commission has stayed its proposed change in the television rule until 60 days after reconsideration is completed, or April 1, 1985, whichever is later, there is no risk that additional television stations will be acquired before Congress has had an opportunity to review the Commission's final decision and conduct such oversight or enact such legislation as it deems appropriate.

Reconsideration, however, may result in significant changes. We emphasize only three points as compelled by the record before the Commission:

(a) After thirty years of growth and increased competition, some change in the television rule is required;

(b) Whatever rule change is decided upon, direct or indirect discrimination against the three national networks cannot be justified; and

(c) The rule change should not be fashioned to protect the private, economic interests of the Hollywood program producers.

Under the circumstances, we do not believe it is necessary for Congress, at this time, to consider any legislative action. We strongly urge Congress to allow the Commission to complete its reconsideration procedure and issue a modified decision.

Thank you.

NEW YORK TIMES

September 6. 1984

5 TV Station Groups To Produce Programs

By PETER W. KAPLAN

In a vigorous response to the rising price of recycled network programming, five of the largest independent station groups in the nation have banded together to produce their own original entertainment.

The Gannett Broadcasting Group, the Hearst Broadcasting Stations, Metromedia Inc., Storer Communications and Taft Broadcasting, representing 32 television stations that reach 45 percent of the viewing public, have agreed to jointly finance new programming that will run for the first time on their affiliated stations. The participants refer to the alignment as the New Program Group.

Although this kind of accord is not unprecedented, it is the first time that so large a block of stations has come to such an agreement. While there is no assurance that it will develop, the agreement dramatizes the new tendency of local television stations in asserting themselves.

For years, the networks have licensed situation comedies from producers, who realize profits on the programs when they have earned back their costs in reruns.

Trying to Reduce Costs

"Shows like 'Cheers' and 'The Facts of Life' and 'Family Ties' only cost the networks around $300,000 to $350,000 per program to produce," said Robert M. Bennett, the president of Metromedia Broadcasting, whose New York-based station is WNEW-TV, Channel 5. "When they go into syndication, they can generate over a million dollars per episode. If we could produce series for the same cost as the networks we could end up — once we've got 30 shows of one series — reducing our costs to a fraction of what we're paying now to rerun their product."

Although its final relationship with the producers will be as buyers, the group will function more as the networks do in earlier stages: In ordering the product, it will have creative control over the situation comedies and also financial control. "The producer will work for less money," said one executive, "the distributor will work for less money, and what they will receive in return will be more control over their product. We are not going to be standing over their shoulder telling them what they can and what they cannot produce."

"This isn't supplanting the networks, or starting a fourth network," Mr. Bennett said. "Producers will come to the group to see it as a way to get things on the air."

Mr. Bennett said that the main impetus for starting the group was the "astronomical" cost of buying rerun programs from distributors.

Jeff Davidson, the president of the Gannett Broadcasting group, said the price of bidding on situation comedies had risen dramatically. One industry source said that although a few years ago situation comedies cost about $15,000 per episode in a market like Boston, when the NBC comedy "Cheers" went into bidding, the price was up to $60,000 per episode.

Dearth of Comedies

The dearth of situation comedies as well, Mr. Bennett said, had spurred the agreement among the broadcast groups. Although the half-hour comedies have fallen out of favor among the networks in the last few years, they are, in time structure, reusability and audience reach, just right for the independent stations. Metromedia has had a success in its resuscitation of a canceled network comedy, "Too Close for Comfort," of which 44 new episodes have been produced.

"We always need more programming," said Mr. Bennett, whose company's seven stations can reach 24 percent of the American viewing population. "When you have seven television stations, you have to feed that monster. All our programming used to come out of the networks — the programming would come out and it would be gobbled up. Now there is so little of it that we can only get one sitcom a year."

In the television industry, a program that can be rerun on a Monday-through-Friday basis is known as a "strip show." These are the guts of any independent station's daily schedule, and situation comedies are the most flexible kind of strip shows to run: They can be put on any time of the day and they appeal to a large audience. To successfully run a strip show, however, there have to be at least 90-100 episodes so it can be recycled without wearing the product out.

"Now we're buying futures," said Lucille Salhany, a vice president at Taft Broadcasting, "Independent stations need to control their own program inventory, because these days a network is canceling a program after three years, and that leaves us with only 65 episodes."

Most of Top Markets Represented

The agreement among the five independents involves a financing proportionate to the amount of viewing population each reaches. Since most of the biggest television markets are encompassed within their scope, the circulation of the new programming would be considerable.

"Here you have nearly 50 percent of the United States in those groups," Mr. Bennett said, "21 of the top 25 markets. When you have that kind of clout, then the project will take on more importance. It's a case of running a show in which the independents have some participation and which they are going to give some special treatment."

Mr. Bennett said that the five groups had agreed they would explore the development of pilots with various producers, that one would be announced within a week or two, and that the pilot "would be scheduled as a weekly show between April and September of 1985."

"It will be of network quality, and done with network production dollars," he said.

More Independent Programming

Recently, independent stations have broadcast more and more programming of their own, syndicating new episodes of series like "Fame" and setting up ad-hoc networks with special presentations like "Operation Prime Time" movies, which have included the biographies of Golda Meir and Anwar el-Sadat. Not only have the programs been well-received critically, but their viewing numbers have been high, and independent stations, as much as cable stations, have taken viewers away from the networks.

"We're trying," said Mr. Davidson of Gannett, "to have some control over our own destiny in the long run."

"When the networks cancel a program," said Mr. Bennett, "it ends up in syndication. The decision as to what kind of programming we run four years from now is in the hands of the three networks. I'd rather not have three creative heads at the networks deciding right now what our programming will be in 1988."

Senator HATCH. Thank you, Mr. Erlick.

We will turn to you, Senator Taft.

Mr. TAFT. Thank you very much, Mr. Chairman and members of the committee. I am Robert Taft, Jr., counsel for and a Director of Taft Broadcasting Co., which I have been since the founding of the company, except for the period which I was serving in the Congress.

Taft is a member of a group owners association known as the Television Operators Caucus. We are similarly situated in this caucus, and Taft believes that caucus members strongly support repeal or relaxation of the multiple ownership rule for television stations. There may be some minor differences of approach among members of the caucus, and I speak only for Taft, but we believe that our views are generally reflective of the other members of the caucus.

Taft Broadcasting understands that the purpose of the hearings is to allow this committee to examine the possible effects, if any, on competition in the television business from the repeal or revision of the multiple ownership rule. Our comments will therefore be directed principally to the antitrust concerns that could be involved, rather than to the more general question of communications policy.

By way of background about Taft, I will simply say that, as a group owner, we have seven television stations, four of which are affiliates; three of them are independent stations located in large to medium size markets throughout the country. We also have a cable television operation of small proportions with about 150,000 subscribers and in which we are a joint venturer. We also produce television and theater entertainment programming, and we engage in consortiums with other companies to produce television programming. Through our wholly owned subsidiary, Worldvision, we also distribute television entertainment domestically and worldwide.

The position of our company is twofold: First of all, we believe that the total deletion of the multiple ownership rule for television would not adversely affect competition in our broadcasting markets through increased station ownership throughout the country by group owners, or by television networks, or by both.

Second, should a 12-station rule as proposed by the Federal Communications Commission become final, Taft would see no adverse competitive effect in its television markets as a result of that action. Alternatively, should the FCC amend its rule to prescribe a cap of a specified percentage of U.S. television households for individual television station owners of not less than 25 to 30 percent, we would see there no competitive effect either. Nor do we believe that there would be any anticompetitive effect upon our markets if a double standard were adopted based on the lesser of the number of stations or such given percentages.

Taft believes that the communications and antitrust issues involved and the ever-changing factual situations with regard to television markets involve fluid and complex technical questions which should be resolved by rulemaking by the Federal Communications Commission and should not be encoded into a statute by Congress.

By way of rationale as to how we have arrived at our position: As outlined in detail in the comments of the U.S. Department of

Justice and commented on again today by Mr. McGrath, the relevant market for the product in question, television advertising, breaks down into; one, a national network market, and two, a spot advertising market. The spot advertising market is further divisible into local and national spot markets.

Network and spot advertising differ in that network advertising which is sold by the three major networks provides access to most, if not all, U.S. television households during particular programs and at specific times of day.

Spot advertising, on the other hand, is generally sold by local station employees or representative firms through spot contracts for particular markets and is not considered to be a substitute for network advertising for national coverage. National spot is sometimes used as a supplement to network advertising, but as a supplement chiefly, rather than a substitute. The Department of Justice did not consider it to be in the same market.

Network advertising depends upon network availability of time and the ratings of network programming on network-affiliated and network-owned stations, and is not sold in significant amounts by anyone other than the three networks, ABC, CBS, and NBC. These networks currently compete only with each other in such sales and would continue to do so regardless of the number of stations they own. In spot market sales, on the other hand, the market and pricing for each station's advertising time depends upon its audience ratings and programming as assessed by advertisers. Sales depend upon the advertisers' assessment of the programming involved and the positions in the program of the spots offered. Therefore, a proposed percentage cap on total TV homes reached or reachable would not seem to be a rational standard because it fails to take into account these factors.

For instance, as to the so-called ADI ratings, take a look at some of the markets in which we have stations. Let us take the Washington market; we find that in the Washington market, with ADI TV homes of 1,500,000 people, channel 20 would have an ADI net weekly circulation of 900,000. In other words we might reach at some time during a week some 60 percent of that market. However, if we take a look at the ratings or the share, we find that our share would only be a seven, and our rating would be even lower at two.

Now, the next station up, for instance, which is also an independent station, would have an 84 percent ADI rating, they would have a share of 17 and a rating of 5 as against our 2 or 150 percent higher, and our advertising rates and advertising placed with us relates to those rating standard, not to the ADI homes at all.

What the advertiser considers is average quarter-hour ratings and demographics. Thus, the ownership of a station in question is not a factor as to such advertising sales in the market, and a change in the multiple ownership rules should not have any impact on the local market. This conclusion is, of course, based on the assumption that the so-called duopoly rules restricting multiple ownership within overlapping grade B contours remain in effect, so that each station in the market will have a different owner.

Finally, I would like to mention another matter that has been touched upon today. That is the possible competitive impact upon the supply of television markets. Some concern has been expressed in that regard.

It is Taft's position that so long as the syndication and financial interest rules remain intact there will be no such adverse impact, since the networks will remain restricted as to their production and sales of off-network prime television entertainment product. Taft believes that repeal or modifications of the multiple ownership rule would not threaten in any way the supply of either prime time or other television product.

As discussed in the various proceedings relating to the syndication and financial rules, the number of suppliers and the quantity of television product—other than for prime and off-network showing of prime time programming—is highly competitive as to most types of product. In fact, the additional financial growth opportunities offered to television group owners through repeal or relaxation of the multiple ownership rule would seem to promise more investment in television production and thus to strengthen competition in the television product supply area.

Thus, it is Taft's position that competition will in no way be threatened by repeal or relaxation of the multiple ownership rule and we believe that the public interest will be served by the repeal or relaxation of that rule.

Thank you very much.

[The following was received for the record:]

Prepared Statement of Robert Taft, Jr., on Behalf of Taft Broadcasting Co.

I am Robert Taft, Jr., I have been Counsel for and a director of Taft Broadcasting Company since its founding except when I was serving in Congress. I am appearing here today for Taft, a typical large group owner of television stations. Taft is a member of an informal organization of group owners, known as the "Television Operators Caucus," who are similarly situated and Taft believes strongly in support repeal or relaxation of the Multiple Ownership Rule for television stations, as well as for AM and FM radio. There may be some minor differences of approach among members of the Caucus, and I speak only for Taft.

I. QUESTIONS PRESENTED

Taft Broadcasting Company understands that the purpose of these hearings is to allow this Committee to examine the possible effects, if any, on competition in the televison business from repeal or revision of the Multiple Ownership Rule for Television Stations (47 C.F.R. § 73.636B), as well as any questions of antitrust law or policy which might be raised by the Federal Communications Commission action. Of course, the Committee jurisdiction relating to the Federal Communications Commission and the Communications Act generally lies primarily with the Senate Committee on Commerce, Science and Transportation and, particularly, its Communications Subcommittee, as well as with the corresponding House Committee and Subcommittee. Taft's comments will, therefore, be directed to the antitrust concerns that could be involved, rather than to more general questions of communications policy.

II. DESCRIPTION OF TAFT BROADCASTING COMPANY

Taft Broadcasting Company is a diversified communications and entertainment company with operations in television and radio broadcasting, cable television, entertainment programming and amusement park and related leisure-time interests. The company is a television group owner, owning and operating seven television stations consisting of four network affiliates (ABC affiliates in Birmingham, Cincinnati and Columbus; and NBC affiliate in Kansas City, Missouri, (all VHF); and three independent television stations in Miami, Florida (VHF) and Washington, D.C. (UHF). The company also owns and operates six AM and seven FM radio stations.

The company's cable television operations are carried on through a joint venture partnership with Tele-Communications, Inc., a large multiple owner of cable television systems. The joint venture currently serves approximately 150,000 subscribers.

The company produces television and theater entertainment programming which it sells to others and uses itself, and engages in consortiums with other companies to produce television programming. Through its wholly owned subsidiary, Worldvision Enterprises, the company also distributes television entertainment domestically and worldwide.

Through these various company activities Taft is well placed to evaluate any possible competitive impact that might result from the proposed change in the multiple ownership rule for television stations.

III. TAFT BROADCASTING COMPANY'S POSITION

As a television station owner operating both network affiliates and independent stations in various type and sizes of markets, Taft believes that a total deletion of the Multiple Ownership Rule for Television would not adversely affect competition in its broadcasting markets through increased station ownership throughout the country by group owners or by television networks, or both. Should a twelve station rule, as proposed by the Federal Communications Commission, become final, Taft would see no adverse competitive effect in its television markets as a result of such action. Alternately, should the FCC amend its rule to prescribe a cap of a specified percentage of U.S. television households for individual television station owners of not less than 25 percent to 30 percent as has been suggested, Taft does not believe there would be any adverse competitive effect upon the television markets which it serves. Obviously, if a double standard were applied based on the lessor number of stations or given percentages, there would likewise be no adverse competitive effect.

Taft believes that the communications and antitrust issues involved and the ever-changing factural situations with regard to television markets involve fluid and complex technical questions which would be resolved by rulemaking by the Federal Communications Commission and should not be encoded into a statute by Congress. Both the Department of Justice and the Federal Communications Commission stated that FCC existing safeguards would be adequate to curb any anti-competitive impact in so far as the Communications Act is concerned with protecting the public interest, convenience, and necessity.

IV. RATIONALE FOR TAFT BROADCASTING COMPANY'S POSITION

A.—Competition will not be affected materially by repeal or relaxation of the current rule.

As outlined in detail in the comments of the United States Department of Justice filed at the Federal Communications Commission in the Matter of Multiple Ownership of AM and FM and Television Broadcast Stations, BC Docket No. 83-1009, the relevant market for the product in question, television advertising, breaks down into (1) a national network market and a (2) spot advertising market. The spot advertising market is further divisible into local and national spot markets. As commented in the Department of Justice filing (page 10): ". . . viewers, the apparent consumers of television are actually the 'product' sold to advertisers, the real purchasers in the television marketplace. . . . Advertisers acquire time on programs to deliver commercial messages to audiences. The price of audiences is measured in terms of dollars per thousand viewers per unit of time."

Network and spot advertising differ in the network advertising, which is sold by the three major networks, provides access to most, if not all, U.S. television households during particular programs and at specific times of day. Spot advertising, on the other hand, is generally sold by local station employees or representative firms to be a substitute for network advertising for national coverage. National spot is sometimes used as a supplement to network advertising; the Department of Justice does not consider it in the same market.

Network advertising depends upon the network availability of time and the ratings of network programming on network-affiliated and network-owned stations, and is not sold in significant amounts by anyone other than the three networks, ABC, CBS and NBC. These networks currently compete only with each other in such sales and would continue to do so regardless of the number of stations they own. In spot sales, on the other hand, the market and pricing for each station depend upon its audience ratings and programming as assessed by advertisers. Sales depend upon the advertisers' assessment of the programming involved and the position in the program of the spots offered. Therefore, a proposed percentage cap on television homes reached would not seem to be a rational standard because it fails to take into account these factors.

What the advertiser considers is average quarter-hour ratings and demographics. Thus, the ownership of a station in question is not a factor as to such advertising sales in the market and a change of the Multiple Ownership Rules should not have any impact on the local market. This conclusion is, of course, based on the assumption that so-called duopoly rules restricting multiple ownership within overlapping Grade B contours (47 C.F.R. § 73.636(a)(1)) remain in effect so that each station in the market will have a different owner.

B.—Possible competitive impact upon supply of television product

Some fears have been expressed that there might be some anti-competitive impact on the television product supply market through relaxation of the Multiple Ownership Rule. It is Taft's position that so long as the Syndication and Financial Interest Rules (47 C.F.R. § 73.658(j)) and the Prime Time Access Rule (47 C.F.R. § 73.658(k)) remain intact there will be no such adverse impact since the networks will remain restricted as to their production and off-network sales of prime time television entertainment product. Taft believes that repeal or modifications of the Multiple Ownership Rule does not threaten in any way the supply of either prime time or other television product. As discussed in the various proceedings relating to the Syndication and Financial Interest Rules, the number of suppliers and the quantity of television product—other than for prime time and off-network showing of prime time programming—is highly competitive as to most types of product. In fact, the additional financial growth opportunities offered to television group owners through repeal or relaxation of the Multiple Ownership Rule would seem to promise more investment in television production and, thus, to strengthen competition in the television product supply area.

V. SUMMARY

Thus, it is Taft's position that competiton will in no way be threatened by repeal or relaxation of the Multiple Ownership Rule and we believe that the public interest will be served by repeal or relaxation.

Senator HATCH. Thank you very much, Senator Taft.

Mr. Anselmo, we will turn to you now.

Mr. ANSELMO. I have a prepared statement. First I want to say something to Senator Denton. You raised an issue here that I think is very serious in this country. I do not think you got an adequate response and I think you ought to keep raising that issue because people in the movie business also live in this society and people in the broadcasting business are also residents of this society and we all have to live in it. I do not think the answer that some people will look at anything is showing responsibility and leadership in trying to bring better things to this society. And I do not think that necessarily the Motion Picture Producers Association needs to represent certain manufacturers of certain types of product.

And I do not think—and I agree with you, I am not for censorship, but I think there are ways of getting around the facile response that, well, you know, we do not want to step on people's freedom to view. I think this subject ought to be pursued a lot harder than you have at this time.

Senator DENTON. I really appreciate that, sir. I thank you very much.

Mr. ANSELMO. Well, there are a lot of people in this country that feel that way and I am sure there are a lot of broadcasters that feel this way, and I am sure there are a lot of producers that feel that way. Certain people just will not engage in the production of certain kinds of things.

However, that is not what I came here to talk about. What I really came for was to express my indignation. I get a little fed up because I have spent my life operating in an environment where vested interests come in and talk about public interest and talk about minorities and talk about this and they talk about that, and all they are always doing is setting up a competitive screen to keep anybody else out of the business and to make it harder for the other guy to do business by seeking favored legislation.

I do not buy product from Hollywood so I do not have an oar in this stream. But what really amazes me in this private battle that is going on between the Hollywood production studios and the networks—I guess they are not getting along together—is that the networks are not here asking to retain the seven-station rule. Because if anybody stands to lose, it is the networks, and if anybody stands to gain, it is the public who might possibly get some other networks created out of the group owners like Taft here or Metromedia or some of the other group broadcasters. I gather Hollywood does not want that to happen too much because the groups might, with bigger revenues produce more of their own programming and buy less in the market.

Many years ago probably in sessions like this, somebody sat around and decided it was in the public interest that we should not put all of our television on the UHF frequency, it would be better for the public if we kept it on the VHF frequency and restricted those channels and let UHF lay fallow. That was a big mistake, but I guess it was good for the people who had the VHF stations. It was not so good for the public.

Many years ago, about 22 years ago we came in and decided we wanted to program Spanish language television because there was a market there, people were not programming in Spanish and there were a lot of frequencies available. Nobody wanted UHF frequencies. There was not an all-channel set law then. You could not see UHF because certain people and organizations that are represented in this room saw to it that UHF was an inferior medium and still is to this day.

We reached our seven-station limit some 10 years ago and there were hundreds of frequencies lying idle. Nobody wanted to do anything with them. Commissioner Lee was saying: What can we do with these UHF frequencies, nobody will take them, how will we utilize them, it is a shame to let them lie here. And I said: "build Spanish stations." If nobody wants to build them, we will build them.

We went down to the Commission with this proposal. It was just too sacrosanct. You could not touch the seven-station rule and that was that. So we did not build stations. The public was not being served. There were frequencies not being used. But because it was in some people's interests that there be a seven-station limit—and I do not know whose interest that was—we could not provide a needed service.

Later on, when we got into satelliting, it occurred to me that we could bring the signal down and use some other unused UHF frequencies for bringing signals to markets that could not get Spanish programming. So we went to the Commission and said how about creating a low-power thing, how about taking away these stupid rules that will not let you take a signal off a satellite. Obviously, these rules were out there to keep out competition.

It took 4 years, but we did build the first low-power station in this country. Then low power got very hot and every TV evangelist and X-rated movie purveyor and MTV hopeful jumped in. And a very good idea which originally—the proposal was that these should go to minorities first, the low-power stations, because they were the only frequencies available. Instead, we had giant corporations filing 150 applications and pretty soon they had so many applications they did not know what to do with them. So low power is still wallowing around and not getting very far.

We built 12 of them and in the course of the time—it has only been 4 years—we have rebuilt 6, taken them off the air, put them back on the air. All because the seven-station rule prohibited us from building on protected frequencies 10 years ago. And today there are no more frequencies. So now we have at least six markets where Spanish television is going to go off the air soon and there will not be another frequency to bring it back, over the air, free to the people.

I am not here pleading for any help as we will solve our problem. But I am sick of people like the MPAA walking in here and making it tough for everybody else for their own private vested stake, and that is what Hollywood is doing here. I am not for the networks and I am not a member of NAB because I have no use for NAB, but I am fed up with the process that is going on here today.

Thank you.

[The following was received for the record:]

STATEMENT OF RENE ANSELMO

PRESIDENT
SPANISH INTERNATIONAL COMMUNICATIONS CORPORATION
BAHIA DE SAN FRANCISCO TELEVISION COMPANY
THE SEVEN HILLS TELEVISION COMPANY

September 11, 1984

Good morning. My name is Rene Anselmo. I am here today to speak in support of the FCC's decision to repeal the Seven Station rule as it applies to television.

I am president of three companies that together own a total of seven television stations. These companies have been prevented from acquiring additional stations by the Seven Station rule. The companies are: Spanish International Communications Corporation, which operates stations serving New York, Los Angeles, Miami, San Antonio, Texas, and Fresno, California; Bahia de San Francisco Television Company, which operates a station serving San Francisco; and The Seven Hills Television Company, which operates a station serving Phoenix, Arizona. All seven are UHF stations, and all seven broadcast full time in the Spanish language.

Only a few weeks ago, the FCC issued an order which would have reversed an archaic, arbitrary and counter-productive ban on the ownership by one group of more than seven TV stations. The FCC, in its considerable expertise concluded that the public interest would better be served if radio and television, like newspapers, magazines, cable television and other media were not subjected to these limitations. The FCC placed another arbitrary limit of 12-12 and 12 on the industry, but at least it was a step in the right direction.

And then I read in the trade press that the Motion Picture Association of America, who along with other folks, brought us that cultural cornucopia of local television known as prime time access, had once again used its considerable political influence to sidetrack and hopefully kill this rule. Whereas, in my opinion, the FCC is taking a step that will really be of benefit to the viewing public, what we are witnessing here today is a private battle between program producers and potential program producers. The syndicators don't want stronger group owners, because group owners with larger resources are in a position to produce the kind of programming they need. That's competition. And Hollywood wants to legislate rules to weaken the networks while it's members scramble to create new pay and advertiser supported networks to compete against the networks.

And I am surprised not to find the three major networks here arguing for the retention of the seven station rule. Because if it weren't for that rule, today we would have had four or five over the air networks serving the general public.

The seven station rule, like so many of the rules, prohibitions and taboos that have been imposed upon the radio and television industry in sessions like this, are invariably designed to protect the vested interests of the established groups and to keep out competition at the expense of the public at large.

Now I would like to give you a real life example of how this seven station rule has ill-served the public -- at least the public we attempt to serve; the Spanish speaking people of this country.

When we started out in this business 22 years ago, we decided to program to an audience that was not being served, with technology that was not being used . . . idle UHF frequencies. We had a conviction that if you give the public what they want, and what other broadcasters weren't giving them, and that if you provided a needed service to a community, somehow, despite the drawback of this then inferior technology, the public will find a way of viewing you. We reached our limit of seven stations some 10 years ago. At that time there were still hundreds of UHF channels lying idle and there were many cities in this country were there was no Spanish programming available. We could have provided that service. No one else was out there who was interested in building television stations to serve this public.

We approached the Commission to ask its permission to put these idle channels to use to provide a service to an underserved audience. Those were the days when no television operator in his right mind would take on a UHF channel even as a gift.

The conversation went something like:

Yes, we had reached our limit, but the frequencies were lying idle, the Commission didn't know what to do with them, people wanted to see our programming, so how could that hurt the public interest. The answer was . . . yes they agreed, but no! The seven station rule was sancrosanct.

So then, back in 1976 when we first began putting our network programming on domestic satellites, it occured to me that if we could utilize some other technology that was lying around fallow in the public interest of limiting competition to established broadcasters, we might have a way of delivering our programming to people who wanted to see it without breaking the seven station rule that had been revealed to the Commission on Mount Sinai. There were hundreds of frequencies lying around which could be used for what we now know as low power stations. These are considered a secondary service, so that anyone who applies to put a full power station on this frequency can bump you off.

Since no one was much interested in full power UHF stations then, it seemed like a safe, if technically inferior way to go. Low power stations are limited to 1 kw of power in the public interest of forcing them to provide inferior signals so as not to compete with the established broadcasters.

It took nearly four years to get permission to use these frequencies, and by then the original idea of giving first crack at the ownership of these facilities to minority groups was abandoned to the greater public interest of allowing giant corporations, TV evangelists, and X rated movie purveyors the opportunity of submitting thousands of applications, which "has worked in the greater public interest" by tying up the use of these channels for further delays of years and years and years.

We built the first of these satellite interconnected low power stations under the guise of "experimental TV stations" some four years ago. Meanwhile, we built, or helped other groups build, about a dozen of these facilities -- everyone of which provided a new service to the public unlike anything available before.

During this time, since they are, as I said, secondary services, we have been bumped off these channels, forced to shut down the stations, find a new frequency and buy new transmitters to continue providing the only Spanish language service available in the communities. This has happened in six different markets, with a seventh coming up. Well, that was part of the risk of building low power stations. Inferior signals and vulnerability to being kicked off the air by a full power operator with yet another religious format. The problem is, there are no more low power frequencies available in many markets, and there will soon be no Spanish television available in Washington, D.C., Philadelphia, Denver, and Hartford just to name a few.

So that has been the net effect on a real life basis of adhering to the seven station rule. The public was denied a service it was not getting. The frequencies lay idle for 10 years. Then we were forced to use inferior and secondary facilities which are being bumped off the air almost faster then we can rebuild them.

Then, as now, it is always the public which stands to gain when technology and entrepreneurship are not smothered by the established vested interests raising the cry of "public interest" to mask their real motives of protecting profits with minimal risk and minimal work.

In our own particular case, allowing us to exceed the seven station limit ten years ago would have hurt no one.

Not Hollywood, not the three major networks, not the local stations programming only in English in markets where as much as 90% of the population spoke Spanish, and certainly not the public. Retaining the seven station limit, or creating yet another ownership limit might just be fine for a lot of organizations represented in this room. But you can rest assured, that poor old thing called the general public has nothing to gain here today if these restrictions are maintained.

Senator HATCH. We have had some very strong statements here today. There is a lot of heat on this issue. Let us turn to you, Mr. Hubbard. We appreciate all statements, as a matter of fact and I think this is a tough issue—or should I say these are tough issues, it is very, very difficult not only to comprehend but to resolve, and we appreciate the feelings that have been expressed.

Mr. ANSELMO. Well, if the Senator wants more news he will allow more groups to get into networking and then you will have a diversity.

Senator HATCH. Mr. Anselmo, one of the points that I myself made—and I shared it with Commissioner Fowler before this all arose—I said, you know, we are concerned about idea concentration as well as economic concentration and we are concerned about idea domination and viewership and these are significant considerations.

And one point Mr. Valenti did make is, you know, we are not just talking about economic concentration, we may be viewing that in a very high-level context here in some ways in this hearing. But I did make the suggestion—this is the first time I had shared it with Mr. Fowler when he announced this change in the rules—and I made the suggestion, I said, well, I could go along with that if you excluded the networks at this point because I do believe that would create more competition throughout the rest of the industry. I presume you would not disagree with that.

Mr. ANSELMO. I am for letting the other people get into the business.

Senator HATCH. OK. Well, that is what a lot of people in the Congress are concerned about. Now, one thing I am concerned about in addition to that is do the networks have a position here—Mr. Erlick has been eloquent in expressing that position and I am going to read his statement in a little more detail than I have thus far—do they have a point that they deserve to be in this game, this ball game, assuming this 7-7-7 rule is done away with and we open it up to ultimate deregulation?

Mr. ANSELMO. I would certainly never let them have another VHF station. If they are going to expand, they certainly ought to expand in UHF so they could help us build that medium to what it ought to be.

Senator HATCH. I have a feeling that this panel may want to boot you off if you keep making some of those comments because that is a problem here. I think I understand both sides. I think I understand what you are saying and I am——

Mr. Anselmo. I am not pleading their case.

Senator Hatch. I know.

Mr. Anselmo. I am just pleading mine.

Senator Hatch. I have already concluded that. In fact, there are a number of people who have pled their case here today, including Chairman Fowler, in my opinion. On the other hand, there may be a case or two—and I want to look at that and I am going to continue—but I am only one Senator and there are other Senators who are equally concerned here and I just want you to be aware of that. But I do not think the issue, at least among my colleagues that I have shared it with on this, is really whether groups who are radio stations or other independents, whether they could expand. I do not think that is the issue. I think everybody agrees and wishes we had more competition in this area.

The question is whether the networks should be able to go to 12 VHF stations and whether there should be total deregulation sometime in the future, and that is a question that I hope this Congress will resolve in a fair and decent way before it is all over.

Let us turn to you, Mr. Hubbard. I did not mean to take too much time, so let us turn to you.

Mr. Hubbard. Thank you, Mr. Chairman. My name is Stanley S. Hubbard, and I am the chief executive officer of Hubbard Broadcasting, Inc., St. Paul, MN. We own four television stations, two of which are network affiliated, one of which is a terrestrial satellite station, which is a network affiliated station, and an independent television station.

If I may, Senator Denton, I would like to speak on behalf of the broadcasting industry before I get into my remarks, and that is to say that as a broadcasting company we have a policy, Senator, and that policy says that we are the guests in people's living rooms and we do not care to bring into their living rooms what we would not want brought into our own living rooms. And I think it is true, and I share your sentiments, and when I look at cable television, I look a lot at what is coming over subscription television stations and I am sickened at much of what I see.

But on behalf of the broadcasting industry which broadcasts free over-the-air television, I think it is safe to say that all of us are very concerned about what you are talking about and we do not see so-called hard-R or X-rated movies on free over-the-air television, nor will you. I just want to say that on behalf of the broadcasting industry. I think we ought to be very clear about who is programming these types of programs, because it is not free over-the-air broadcasters. It is other people in our society.

I came here to speak to you—and I would appreciate it very much if my written remarks would be in the record.

Senator Hatch. Without objection, it is so ordered.

Mr. Hubbard. On behalf of the rural Americans who are kind of left out of all this dialog—and I wanted to talk very briefly, if I may, about what are known as terrestrial satellite television stations, terrestrial meaning earthbound as against satellites in the sky.

Now, there are countless communities across the United States which are too small to support a television station, and the only opportunity such communities will ever have to have a television station is if a larger television station in a larger market were to build so-called terrestrial satellite stations. Our company, for example, has an application on file before the FCC to build such a station in Redwood Falls, MN. We did file that application with the thought that there would be an expansion in the 7-7-7 rule.

There is no way that Redwood Falls, MN, or people in Redwood Falls will ever have a television station unless somebody like ourselves builds a television station there to retransmit the programming of the parent television station in the larger market which is Minneapolis-St. Paul.

Now, what I am driving at here and the purpose for my coming here is to suggest to you—and I know of personal firsthand knowledge that there are not as many of these stations being built today as there could be because these stations count against an owner's total number of stations. In other words, if I am a television group operator and I have an opportunity to buy a television station in Kansas City, MO, or, on the other hand, to bring new and needed service to Redwood Falls, MN, my business option is going to be to build a station in Kansas City because if I build one in Redwood Falls and that counts against my license count, I am not going to build a station in Redwood Falls.

Now, it is true that there is a cable system in Redwood Falls, but cable once again overlooks the needs and the wants and the desires of the rural Americans because the cable can only go as far as the wired services go, such as the local utilities in the city and beyond the local utility carriage there cannot be cable. So once again, the farmer in rural America or the people that live in the mountains of Utah are left out of the picture because they cannot receive cable.

So I am specifically suggesting this, that in the case of any new rules which may be promulgated or adopted, whether they be a rule having to do with the amount of circulation in terms of percentage of U.S. television households or the number of stations that one company may own, that satellite terrestrial television stations be excluded from those rules, so that in Utah, for example, Senator, there may be investment in new local television stations which will not otherwise be built because the local community cannot of itself support such a station.

Senator HATCH. You are talking about more than just the ability to transmit good signals, these terrestrial stations?

Mr. HUBBARD. I am talking about, for example, in Utah, I know there are stations in Utah that own translators and these translators are very limited in their coverage. They are limited to 100 watts, in some cases, unusual cases 1,000 watts if they are UHF translators.

Senator HATCH. You would beef those up?

Mr. HUBBARD. All I would say is if this rule of 7 or 12 or 20 or whatever did not apply to terrestrial television stations, and let's say in markets below 150, that the stations in Salt Lake City would be able to build full-power satellite television stations and greatly enhance the ability of the people of Utah to receive first-class television coverage.

Senator HATCH. Believe me, it is not just because you are mentioning Utah, though, that intrigues me, but I think that is a good point that you are making. If we can somehow or other—I have got to understand this system that you are talking about a little bit better than I do now.

Mr. ANSELMO. Well, it is simple: Somebody limited the power of these stations so there would not be competition with the other stations.

Senator HATCH. I understand what he is saying and I am also understanding that you are making the point of why should there be any rule with regard to these so-called terrestrial stations. It is a very, very interesting point to me and there may be some great benefits. I think you need to—would you supplement to the committee additional information on this so that——

Mr. HUBBARD. Yes, sir. I submitted a statement which spells it all out, but I think in this case everybody benefits. The networks benefit because——

Senator HATCH. Can you get us some addition to your statement on——

Mr. HUBBARD. Yes, I would be delighted to do that. Thank you very much.

Senator HATCH. We would appreciate it.

[The following was received for the record:]

Testimony
of

STANLEY S. HUBBARD

President
of
HUBBARD BROADCASTING, INC.

Before the
COMMITTEE ON THE JUDICIARY

In regard to the
FEDERAL COMMUNICATIONS COMMISSION
ACTION OF JULY 26, 1984
IN DOCKET GEN 83-1009

September 11, 1984

NON-CONTROVERSIAL PROPOSAL TO GREATLY EXPAND TELEVISION SERVICE TO RURAL AMERICA

I appreciate the opportunity to bring to your attention a means by which Congress and the FCC may make possible greatly increased free, over-the-air terrestrial television broadcast service for the American people.

In this connection I would like to address three major points:

1. There are a vast number of rural communities which do not have any local television service.
2. The existing arbitrary television station ownership limits prevent the building of stations in such communities.
3. There will be no anti-trust or other negative consequences as a result of making it possible to build stations in these communities.

There are a vast number of small rural communities which are beyond the reach of adequate, free, over-the-air television service. Such communities, because of their small size, cannot support a full service local television station or have adequate television service unless a means is found to make it possible for the building of new television stations to serve these communities. Because of their small size, these communities cannot generate the monies required to support a full service local television station; and, therefore, the only possible way they can receive adequate service is through the building of what are known as terrestrial satellite television stations (not to be confused with satellites in space).

Terrestrial satellite television stations are full-power television stations which simultaneously rebroadcast the programming of larger parent television stations which are located in larger markets. These so-called terrestrial satellite television stations often also provide local news, public affairs and advertising for the benefit of the communities in which they operate.

Because of the seven television stations limitation now encompassed in the rules of the Federal Communications Commission, it is not possible for most group owners to consider building terrestrial satellite television stations for the benefit of people in small underserved areas.

There are, however, many examples across the land of first-class, local television service being provided by terrestrial satellite television stations. For example, in Minnesota, where I live, there is a satellite station in the small community of Walker which is provided from a parent station in Alexandria, Minnesota. There is a similar situation in Hibbing, Minnesota, where a Duluth television station has a satellite.

Because of our own experience, our company is interested in providing added television service to underserved communities; and we are anxious to do so to the extent the Federal Communications Commission's rules will allow.

For example, we have recently purchased a failing station in Farmington, New Mexico. We have re-built that station, converted it to a terrestrial satellite station; and it now operates for the benefit of the people in Farmington by retransmitting the programming of its parent station, KOB-TV, in Albuquerque. This station also provides local news, public affairs and advertising. Because our company does not have the limit of seven TV stations, we have applied to build two other satellite stations in small towns in Minnesota.

Smaller markets suffer to the extent the present rules restrict building additional stations.

As the television industry has matured and because group ownership has become commonplace, there is less opportunity for the development of new satellite television stations in rural communities. Group owners are extremely interested in expanding the number of stations they own to the maximum allowed by the Federal Communications Commission; and in that regard, groups are hesitant to build a station in a small market if it may mean they would be prevented from expanding by the addition of stations in larger markets.

Our company has planned to build additional terrestrial satellite stations with the expectation that there was going to be a change in the television rule of seven. As a result of the rule being frozen, we may now be faced with the prospect of having to decide whether it would make good business sense for us to go ahead and build terrestrial satellite stations if we would thereby be prevented from acquiring additional larger market TV stations.

Our organization is only one among many that face this problem. If given the opportunity to build terrestrial satellite television stations without having to worry about those stations counting against an arbitrary numerical ownership limit, many groups, besides ourselves, would be anxious to bring new service to underserved communities.

I specifically suggest that terrestrial satellite television stations located in communities smaller than market size 150, as defined by the Arbitron ADI market rankings, be exempted from any television rule of seven or other rules that may be adopted to limit the size of a television broadcast group owner. I am of the firm opinion, and I hope you will agree with me, that in this regard there should not be any anti-trust problems. Also, I cannot foresee the circumstance where a group broadcaster would be able to significantly enlarge itself through the operation of terrestrial satellite stations so as to become a problem in the consideration of undue concentration of control.

If terrestrial satellite stations in smaller markets were eliminated from consideration in a limit rule, I believe there would be a rapid expansion in free, over-the-air television service.

SATELLITE TELEVISION STATIONS IN THE UNITED STATES

CITY	CALL LETTERS	LICENSEE
	ARKANSAS	
Fayetteville	KTVP	Hernreich Broadcasting Stations, Inc.
	COLORADO	
Durango	KREZ	XYZ TV, Inc.
Montrose	KREY	XYZ TV, Inc.
Sterling	KTVS	Burke Broadcasting Co. of Cheyenne
	IDAHO	
Lewiston	KLEW	NWG Broadcasting Co.
	ILLINOIS	
Champagne-Danville	WICD	Plains TV Partnership

KANSAS

Ensign	KTVC	Southwest Kansas TV Co.
Garden City	KSNG	Kansas State Network, Inc.
Garden City	KUPK	Chronicle Broadcasting Co.
Goodland	KLOE	KAYS, Inc.
Great Bend	KSNC	Kansas State Network, Inc.
Hays	KAYS	KAYS, Inc.
Oberlin	KSNK	Kansas State Network, Inc.

MASSACHUSETTS

Adams	WCDC	Knight-Ridder Broadcasting, Co.

MICHIGAN

Cheboygan	WTOM	WPBN-TV & WTOM-TV, Inc.
Escanaba	WJMN	WFRV, Inc.
Sault Saint Marie	WGTQ	Michigan Center Broadcasting Co.
Sault Saint Marie	WWUP	Wilson Communications, Inc.

MINNESOTA

Hibbing	WIRT	Channel 10, Inc.
Walker	KNMT	Central Minnesota TV Co.

MISSISSIPPI

Meridian	WLBM	TV-3, Inc.

MISSOURI

Poplar Bluff	KPOB	WSIL-TV, Inc.

MONTANA

Butte	KTVM	Eagle Communications, Inc.
Kalispell	KCFW	Eagle Communications, Inc.
Missoula	KPAX	KPAX-TV, Inc.

NEBRASKA

Albion-Columbus-Norfolk	KBGT	Amaturo Group, Inc.
Grand Island	KGIN	Cornhusker TV Corp.
Hay Springs	KDUH	Duhamel Broadcasting Enterprises
Hayes Center	KWNB	Amaturo Group, Inc.
McCook	KSNK	Kansas State Network, Inc.
Scotts Bluff-Gering	KSTF	Burke Broadcasting Co. of Cheyenne
Superior	KSNB	Amaturo Group, Inc.

NEW MEXICO

Clovis	KMCC	McAlister TV Enterprises
Farmington	KOBF	Hubbard Broadcasting, Inc., KOB-TV, Inc.
Roswell	KSWS	KCBD Associates

NORTH DAKOTA

Bismarck	KXMB	Bismarck Television Corp.
Devils Lake-Grand Forks	WDAZ	WDAY, Inc.
Dickinson	KNDX	Northern Plains Broadcasting Group, Inc.
Dickinson	KQCD	Meyer Broadcasting Co.
Minot	KMOT	Meyer Broadcasting Co.

Williston	KUMV	Meyer Broadcasting Co.
Williston	KXMD	Williston Enterprises

NEW YORK

Elmira-Corning	WETM	WETM-TV, Inc.

OKLAHOMA

Sayre	KVIJ	Marsh Media, Inc.

OREGON

Coos Bay-North Bend	KCBY	Eugene TV, Inc.
Klamath Falls	KOTI	Oregon Broadcasting Co.
Roseburg	KPIC	South West TV Broadcasting Corp.

SOUTH DAKOTA

Aberdeen	KABY	South Dakota Broadcasting Co.
Florence	KDLO	Mid Continent Broadcasting Co.
Lead-Deadwood	KHSD	Duhamel Broadcasting Enterprises
Lead-Deadwood	KIVV	Dakota Broadcasting Co.
Pierre	KPRY	South Dakota Broadcasting Co.
Reliance	KPLO	Mid Continent Broadcasting Co.

TEXAS

Big Spring	KWAB	Permian Basin Television Corp.
Bryan	KBTX	Brazos Broadcasting Co.
Laredo	KVTV	K-Six TV, Inc.
Lufkin-Nacogdoches	KTRE	Buford Television, Inc.
San Angelo	KACB	Abilene Radio & TV Co.

WASHINGTON

Kennewick-Pasco-Richland	KNDU	Columbia Empire Broadcasting Corp.
Kennewick-Pasco-Richland	KVEW	Apple Valley Broadcasting, Inc.
Pasco	KEPR	NWG Broadcasting Co.

WISCONSIN

Eau Claire	WQOW	Liberty Broadcasting, Inc.
LaCrosse	WXOW	Liberty Broadcasting, Inc.
Wausau	WAOW	Liberty Broadcasting, Inc.

WYOMING

Lander-Riverton	KOWY	The Chrysostom Corp.
Rock Springs	KWWY	The Chrysostom Corp.
Sheridan	KSGW	Duchamel Broadcasting Enterprises

List supplied by ARBITRON Ratings Company from data covering May, 1984.

Senator HATCH. Let me turn to Senator Denton for any questions and then as soon as he is through Senator Wilson and as soon as he is through we will go to Senator Specter.

Senator Denton?

Senator DENTON. Thank you, Mr. Chairman. I would like to follow up on that point. Are you saying that the current broadcast ownership rule restricts the ability of most group owners to consider building terrestrial satellite television stations for the benefit of under-served areas?

Mr. HUBBARD. Yes, sir, that is what I am saying.

Senator DENTON. I have received many letters from my constitutents that live in rural areas that are unable to get adequate television reception without a satellite dish.

Mr. HUBBARD. Yes, sir.

Senator DENTON. I, like Senator Hatch, want to know more about this matter so that I can determine what not to do and what to do to help my constituents.

Mr. HUBBARD. That is what I am saying, Senator. I am saying that if a company such as Taft, which owns a full complement of television stations, had the opportunity to bring a new service to a small town that did not have enough population to support a television station, if there were no such rule applying to these satellite, terrestrial stations, they could then spend the money to go out and build stations and bring added service to communities that do not have good service. And these stations are not only passive transmitters of a parent station's program. Most often in the case of stations we operate, they also have some local news and some local advertising outlets and I do not think it poses a threat to any concentration of control if these stations were eliminated from the ownership count.

Senator DENTON. I believe I heard you say on behalf of the National Association of Broadcasters or——

Mr. HUBBARD. No, just on behalf of broadcasters, of which I am one.

Senator DENTON [continuing]. Of broadcasters, that there are not television shows being transmitted into anybody's living room that you have not cleared or that you do not make a conscientious effort to examine from the criterion of welcoming it into your own living room. I believe if you had a national poll you would get over 90 percent of the people in the United States disagreeing with that statement.

Mr. HUBBARD. Sir, first of all, if you are going to take that poll we must be very careful to make sure that people know that we are talking about free over-the-air television and not about what they are seeing on their cable or on their subscription station, because I can say this without any fear of contradiction: You never see any naked bodies on free over-the-air television. You see violence, but you do not see violence of the extent that you see on cable or on the subscription stations.

Senator DENTON. Comparing the kind of cable stations you are talking about to regular broadcasting, I would not have any disagreement with you.

Mr. HUBBARD. Thank you, sir.

Senator DENTON. I am not sure from most people's thinking, you are correct in saying that there are not any programs being received in homes from regular broadcasting that really should not be there. I am also not sure that your industry is doing as much as you should in the sense of examining it from that point, recognizing that you are not necessarily going to babysit a 14-year-old or a 15-year-old. They are there at 11 o'clock at night.

Mr. HUBBARD. Yes, they are, Senator.

Senator DENTON. I admit that there are things, other than sex, that are undesirable for your children to watch on television. What are you going to do about it? I do not know the answer but I believe that something must be done.

Mr. HUBBARD. We do something about it, Senator, if I may, and I have five children and I have a grandchild, and there is nothing that I see on commercial television that I would be fearful of having them see. But there is much of what I see on cable television, on our subscription television stations that I do not want them to see.

Senator DENTON. Thank you very much for your remarks. Mr. Anselmo, if you had to choose between the movie industry and the broadcasting industry and you say that the movie industry is mostly the ones trying to restrict in the sense that——

Mr. ANSELMO. Well, they really are trying to get the legislation stopped because they want to sell programs. I am saying we ought to be here saying what is wrong with the broadcast industry? What is wrong with the broadcast industry? There is not enough competition, and the reason there is not enough competition is that if you want to compete you have 1,500 taboos and rules that keep you from competing. One of them is the seven-station rule. Metromedia will never effectively compete with ABC if they cannot build a group of stations, nor can anyone else. So that is one.

Senator DENTON. I hear what you are saying.

Mr. ANSELMO. No. 2, there are a lot of silly rules like Mr. Hubbard is mentioning. For 30 years we could have brought television to rural communities and it was denied. You could not build those stations because it would count against you, so who is going to put a station up which will not make money for you?

You go where you are going to make money. These things were put in to line somebody else's pocketbook, and I am getting fed up with this stuff here in this society. There is too much of it, of chasing dollars. Nobody is talking about the public interest. Never really the public interest. It is their interests first and then the public interest last.

Senator HATCH. Senator Wilson, could I just ask one question first. Let us say that the FCC came out with a rule that abolished the 7–7–7 rule for everybody but the major networks, would you think that would be a good idea? And would that increase competition?

Mr. ANSELMO. Well, I think that would be unfair. They are not paying me, but I think that would be unfair. There have got to be other ways to stop abuse of power.

Senator HATCH. What if you had the choice between having the 7–7–7 rule or not having that rule?

Mr. Anselmo. The only thing I would do is restrict their expansion strictly to the UHF spectrum, and I would not have any problem with that.

Senator Hatch. But you would be happy with an unlimited rule for everybody but the networks, although they could expand UHF?

Mr. Anselmo. UHF only, yes.

Senator Hatch. OK.

Mr. Anselmo. I would not let anybody acquire more than five VHF's. Anybody * * * network or anyone else.

Senator Hatch. Senator Taft, if we had a rule whereby 7-7-7 rule was done away with for everybody but the three major networks, would you feel good about that, would Taft Broadcasting feel good about that, because it certainly would allow you to compete with the major networks?

Mr. Taft. My concern is, and the people that I am representing here are concerned only with what happens to themselves, of course

Senator Hatch. Sure. You would be happy with that then?

Mr. Taft. Group owners would take care of themselves, but we have taken a position, and believe we are justified in the position that it really does not matter, because there is not going to be any effect on competition in the advertising markets, either the national or the local spot market.

The only connection that we can see between the ownership rules and program diversity that has been mentioned here today is that what the stations and what the networks out on the air are going to be controlled by what the advertisers think the public wants. There is going to be no effect on competition, so it does not matter one way or the other to us. We will take it that way or we will take it the other way. We want relaxation or repeal. Neither would be our preference.

Senator Hatch. Mr. Fritts, there does not seem to be much contention that the broadcasters should not be deregulated at least by 1990. I have not heard many criticisms of the broadcasters. The major element here of dispute happens to be a concern about the dominance of the three major networks over all aspects of the media. If we applied the 12-12-12 rule or, to be a little more specific, if we used the Senator Wilson bill to allow anybody to expand up to approximately 25 percent, would you have any difficulty with that kind of an approach vis-a-vis going to the 12-12-12 rule?

Mr. Fritts. Let me make one point clear. We feel very strongly that there should be no discrimination between the current networks as they exist today or the group owners who may be potential networks for tomorrow. We are in the middle of an evolution of technology which is providing satellite transmission at a pace and technology faster than any of us can keep up with.

The problem is programming and what do all of these various technologies put on the air themselves. We have the networks as they are today, we have on the one hand the group broadcasters who for all we know tomorrow might very much like to have an economic base to build their own network and perhaps to build their own programming capsules for prime-time programming.

We talk in terms of dominance. In Los Angeles today there are 21 television stations. In 1990 there will be 37 television signals in

Los Angeles. How many of those can the three networks control? In Chicago today there are 16 television stations. In 1990 there will be 21 television stations. How many can the three networks control? And the list goes on and on.

The projections for 1990 show there will be 1,665 television stations, 500 AM radio stations, 5,300 FM radio stations, cable penetration of 60 percent in 1990. So we have a snowball that is rolling forward insofar as technology is concerned, and I do not know that any hard and fast rule today, without some degree of flexibility, would allow the Tafts, the Metromedias, or the SIN's or whoever to expand to effectively compete in tomorrow's market.

Senator HATCH. That is what I am talking about. Under the Wilson bill they would allow an expansion even for the major networks of 22.5 percent of the television households in the United States on VHF, and by adding UHF they could get up to 27.5 percent. Do you have any difficulty with that?

Mr. ANSELMO. Well, the cable networks can reach more than that. That is not fair.

Mr. FRITTS. The National Association of Broadcasters, for the record, would not oppose legislation of that magnitude.

Senator HATCH. That is what I——

Mr. FRITTS. Our friend does point out very vividly, however, that cable——

Senator HATCH. That does not stop Metromedia or Taft or any of the——

Mr. FRITTS. It inhibits them at that level. They cannot grow beyond that level.

Senator HATCH. That is right.

Mr. FRITTS. Whereas if a cable operator—there are what, currently 25 cable networks on the air today, 25 cable networks. Some of you said you did not have cable in your homes. You will not get that many if you have cable. But I have 36 channels where I live in this area. There are 28 cable networks, 4 super stations on the air, and 10 pay services that are on the air today.

The public has a great magnitude of liberality when it comes to choosing and selecting programming in today's marketplace and the public is the ultimate arbiter by turning the dial when something they do not want to see comes on the air.

Senator HATCH. Well, let me just say, Mr. Hubbard, that I am not fully aware of what you are saying, but what you are saying sounds very good to me, if I understand it correctly in that there is little or no reason to have any rule with regard to bringing television into the rural communities, and that even the networks benefit from that as well as everybody else.

Mr. HUBBARD. Everybody benefits. Hollywood benefits because that means——

Senator HATCH. Right now you are saying the 7-7-7 rule prevents you from doing that.

Mr. HUBBARD. Yes, it does because those little stations that we would want to build to bring service to rural America count as a station against the owner's total.

Senator HATCH. And you have limitation as far as translators and so forth, is that right?

Mr. **Hubbard**. No, the translators, there is no limitation on translators but translators are ineffective as compared to what a full-power satellite station in a rural community could do.

Senator **Hatch**. OK.

Mr. **Erlick**. Mr. Chairman, could I try your patience for just 2 minutes. Since your comment concerns networks, if you do not mind I would just like to make a brief attempt to——

Senator **Hatch**. Surely. I did not mean to ignore you. In fact, I intend to ask some questions of you before we are through.

Mr. **Erlick**. Thank you, sir. I would beg your indulgence for just 2 or 3 minutes. When ABC entered the networking business in the early 1950's, a lot of people said you cannot do that, there is no market, you cannot get affiliates, you cannot afford to buy programming, you cannot operate your stations in competition with the two established networks and you just cannot do it.

ABC chose not to believe that advice. ABC between 1951 and 1971 lost tens of millions of dollars attempting to make its television network successful. It invested in entertainment programming. It borrowed $50 million from Metropolitan Life—and I was there and voted for it—because it did not have the money to program that network, but it took the gamble. And that is what the free enterprise system is all about, Mr. Chairman, as I understand it.

I have heard some things here this morning that absolutely amaze me, which I will talk about in just a second. We did not come down here and ask Congress for protection. We did not come down here and ask you to guarantee us a return on that investment. We did not come down here and ask you to insulate us from any competition.

You advance cable television, so be it. That is the American way. You advance satellite broadcasting, fine. You advance independent television stations. The growth of television stations in this country went from 199 to 1,169 and still climbing, wonderful. That is what it is all about.

Taft and four other companies want to go into production and create their own mininetwork, an ad hoc network. ABC says wonderful. That is the way we started, that is the way we got built and we are all for it.

Now to say, having achieved a certain degree of success, having achieved first parity with the other two networks and now some distinction such as in the recent Olympic games—and let me add this: How would your people like it if the last Olympic games were on a pay basis and not a free basis? How many letters do you think you would get from the members of the public in your State? And keep in mind, the second largest bidder for the rights to the 1984 Olympic games in Los Angeles was a pay television company. We out bid that company. We took an enormous business risk. And when the Russians pulled out and the Eastern bloc pulled out, we did not know how we would do. Fortunately, I am happy to say, we did well.

Some of those things ought to be recognized. These three network companies spend $450 million a year or more on a news and public affairs service which makes the American public the best informed public of any in the world, bar none. The reason people watch news on television is because they believe it. They trust it and they find it credible and objective, although everybody does not agree. I do not say that everything we do is perfect. We are far from it. We are human beings. We do our best. But we do provide the American public in the form of news and public affairs and Olympics and special events and programs like "Roots" and others a fine service which is the best in the world. It is a quality service and it is one which the Congress of the United States ought to be looking to protect and further and advance and not diminish.

And I say to you when you say to a network company that you ought to be treated differently than any other company in this business, you ought to be restricted in ways that other companies are not restricted, then you are going a long way down the road to impairing and diminishing that service and you had better ask yourselves some very hard questions as to whether that is what you want to do and whether the American public will support such an action on the part of the Congress.

Finally, I would like to say to Senator Specter, for whom I have enormous respect, that when you start talking about interfering with contractual relationships between a private station and a network—a pure private arrangement which two people individually and privately think is beneficial between themselves, which has resulted in the finest service in the world to those individual markets—when we start talking about the Government interfering with that kind of contractual relationship, we are going way down the road to "big brotherism," and I think that that is a suggestion which frankly goes farther than any I have heard in the 35 years I have been in this business.

Senator **Specter**. I did not talk about interfering with any private contractual relationship.

Mr. **Erlick**. I may have misunderstood you, Senator. If I did, I apologize.

Senator **Specter**. Well, I think you did.

Senator **Hatch**. I do not think you did.

Senator **Specter**. There was no suggestion of that in any way, shape, or form.

Mr. **Erlick**. I beg your pardon, sir. I misunderstood you.

Senator **Specter**. We are talking about areas of control and areas of dominance and the point that I was raising on a question was whether the ownership issue had any real relevance to it, if the dominance was not already in existence by virtue of the contractual relationship and the networking. But I said I was not about to make a proposal to change that.

Senator **Hatch**. That was my understanding. Let us go to Senator Wilson and then we will go to Senator Specter.

Senator **Wilson**. Thank you, Mr. Chairman.

Mr. Fritts, did I understand you to say, sir, that your organization, the National Association of Broadcasters, is not opposed to the legislation that I have introduced with Mr. Hatch, Mr. Kennedy, and Mr. Inouye?

Mr. **Fritts**. As I heard it explained by Senator Hatch, that is correct, Senator.

Senator **Wilson**. That is welcome news.

Senator **Hatch**. Well, I interpreted most of them are not. The way I interpreted Mr. Erlick is that he just wants to be treated on the same level as the others, he wants to be able to compete, if we are going to put a restriction on level of ownership, then that would apply to everybody.

Mr. **Erlick**. Yes, sir, provided those levels of——

Mr. **Anselmo**. Including cable ought to be, Senator.

Senator **Hatch**. Including cable.

Mr. **Erlick**. Provided those——

Mr. **Anselmo**. They are building national cable networks to compete with everybody. They have no restrictions on them. Why are you going to bust down our television networks like we busted down the telephone company and make a mess of it? You have got a good thing going here. You know, I do not watch English TV, but they do a good job. I am in a different business. But why bust them up?

Mr. **Erlick**. Let me just say this, Mr. Chairman, what I intended to say, perhaps this will clarify it, is that if Congress decides in consultation with the FCC that there should be some reasonable limitation on audience reach as well as number of stations, we would support that.

Senator **Hatch**. That is what you said earlier.

Mr. **Erlick**. I am not attempting to tell this Committee nor would we attempt to tell the Commission what those precise numbers are because, quite frankly, we do not know. They should be reasonable——

Senator **Hatch**. Sure.

Mr. **Erlick** [continuing]. And reasonable men should be able to arrive at a reasonable number, and that is all we are saying.

Senator **Hatch**. You see, that is the point that I think was made at the beginning. When Mr. Fowler called me, I said to him, I said, well, we are concerned about competition. You know, the purpose of these hearings is not to urge laws that would insulate anybody from competition but to view the effects of competition, you know, of any change in the 7-7-7 rule.

Mr. **Erlick**. Yes.

Senator **Hatch**. But, I think you have, I think, spoken here very competently and very fairly that you are for reasonable approaches here.

Mr. **Erlick**. Yes, sir.

Senator **Hatch**. What is dawning on me is that I am not sure that a 12-12-12 rule, with an ultimate deregulation that may give intense economic power to maybe the three major networks, maybe a couple more people on top of that, is the right way to go. I think that is the concern of every Member of Congress right now, and that is why Senator Wilson and some of the rest of us have come up with a bill that we think may be fair, would treat everybody fairly but still allow that type of competition to exist that should exist, and that even I think considers the fact of idea dissemination in our society.

I for one, Senator Wilson, would like to see an amendment that would resolve the problem that Mr. Hubbard has mentioned because I think that is a heck of an important problem.

Senator **Wilson**. Mr. Chairman, I think Mr. Hubbard has highlighted an area that the committee needs to give its attention to and that is the service to the rural consumer who really is not presently served. I think we should be grateful to him for bringing that to our attention.

I am delighted to hear Mr. Erlick's comment with respect to there being no objection to a reasonable reach limitation. That is precisely what is being proposed, and it is a limitation that we think would allow a very considerable amount of competition to exist. In fact, it would allow everyone to grow at least somewhat, insofar as I am aware, and some of the group owners whom we have not mentioned today I think would perhaps have substantial room for growth—Chris Kraft, Cox, RKO, in addition to Gannett, Hearst, Metromedia, Storer, Taft—some, perhaps a few, might be right at that limit or nudging it.

But for the vast majority there is ample room for growth. I mean in several cases they could triple their reach under the limits that we are proposing.

Mr. **Anselmo**. What are your limits, Senator?

Senator **Wilson**. 22.5 percent or in conjunction with a proposal for minority ownership 25 percent. And responding to your interests, Mr. Anselmo, in UHF we would provide that the cap for total VHF and UHF be 27.5 percent. Now, I think that is pretty liberal.

Mr. **Anselmo**. I do not know. I am in a different area. I do not know what 27.5 percent means.

Mr. **Fritts**. I would like to clarify one point for the National Association of Broadcasters. We do not endorse specific numbers today. We endorse the concept of a percentage cap.

Senator **Wilson**. I am pleased to hear your endorsement of the concept. I think that is a significant step.

Mr. **Fritts**. We also further would like to see the FCC have the opportunity to conclude their procedure and at that time have Congress address the issue if they are not satisfied with the action that the FCC takes.

Senator **Wilson**. In other words, if you are saying what I think you are, you are endorsing the proposition that was advanced by my friend, Senator Specter. I think he has identified a very real and sore lack in the process by which an independent Commission—in this case the FCC—is trying to fulfill its responsibilities. As he has pointed out, we have been engaged in crisis lurching of a kind that nobody finds particularly attractive. It is not the method we would choose if a better method were available. A better method I think should be made available and I think one of the things that we should do, Mr. Chairman, is to construct a process that is roughly on the order of the kind that Senator Specter has suggested. That will allow us to not react in the fashion that we have been compelled to here, but instead to have adequate notice of what it is that the commission intends to do so that Congress can express itself.

But I must admit that I am heartened by today's hearings because I think that what we have found is that there is opportunity for ample growth that will lead to a great deal more competition, I would suggest, gentlemen, than presently exists. I think that with a 22.5-percent limit there is an opportunity for very significant growth on the part of a number of group owners. As they grow they can become far more competitive, they can provide an infinitely better market for those who are independent producers, and they can provide competition far beyond that that now exists. The ultimate beneficiary of that competition clearly is the viewer of American television.

Mr. ANSELMO. Senator, the big question that has to be answered is that by limiting the new potential networks to that maximum, are they ever really going to be able to compete?

Senator WILSON. The new ones?

Mr. ANSELMO. Yes, the new ones.

Senator WILSON. Oh, I think they can because, for example, to take Mr. Erlick's——

Mr. ANSELMO. They have got 100 percent of the market.

Senator WILSON [continuing]. Mr. Erlick's enclosure, the story from the New York Times, which I thought was very interesting, this is the one that he brought to our attention. This is just the lead to the story:

> In a vigorous response to the rising price of recycled network programming, five of the largest independent station groups in the Nation have banded together to produce their own original entertainment.

Five of the largest independents presently represent 32 stations in a total of 45 percent of the total market. They would not be curbed by what we are proposing. They would have an opportunity for growth, and in some cases could almost triple their present reach.

Mr. FRITTS. Senator, I would like to make one additional clarifying point. I was not endorsing what I thought Senator Specter was implying with the——

Senator WILSON. Well, I suggest to you, sir, that I think you should. I think he has identified a very significant problem.

Mr. FRITTS. I think that the Federal Communications Commission, after a hearing such as they have had today, in their normal course of oversight, in reporting to the U.S. Congress, certainly there is oversight and an intent, as we heard the chairman say earlier, to confer with the Congress to get their views. It seems to me that they should not have to check off every small rule and regulation with the 6-month moratorium before they move forward on it.

Mr. HUBBARD. Lest the American people in another company which I represent get caught in a trap, we are the licensees of a direct broadcast satellite permit and, of course, it is the purpose of putting $200 million into satellites for direct broadcast satellites to broadcast to the entire United States. And I know that the Congress, the House of Representatives sent a sense of the Congress letter to the FCC saying full speed ahead and high-powered direct broadcast satellites have the prospect of providing up to 32 more channels of television for all of the American people.

May I respectfully suggest, so we do not get caught in a trap, that any legislation that might be written very clearly specify so that our competitors do not have an unfair advantage over us, that this legislation applies to terrestrial television stations and not to direct broadcast satellite stations because it would be very easy to construe whatever you are doing to apply to what we want to do and that would shoot us out of the water halfway down the investment line and that would be a terrible catastrophe for our company.

Mr. ANSELMO. That is the problem and that is the reason I came here, because when you start writing these things, you are always going to keep somebody out, like we were kept out of trying to provide service because of the seven-station rule, and if you put a 22-percent rule in, how are you going to handle Mr. Hubbard's case or our case? We have satellite network programs, a satellite network. How about the cable systems?

Does the USA Network, does Turner's cable network—these people are all covering more than 27 percent of the households. You cannot help but do it because of the nature of satellites. So how are you going to write those rules?

Senator HATCH. Let us turn to Senator Specter, and we will wrap this panel up I think as soon as we can. I will turn to you now.

Senator SPECTER. One comment about the procedures we are going to operate under: I am not saying that there ought to be a delay on all matters which the FCC rules upon, and these substantive matters are very complex and I am not in a position to make any decisions on substantive questions we are taking up today.

But I have seen a great deal of push on a very immediate basis on using the appropriations process to cut off funding to achieve a result substantively and I think if there is one thing that no one in this room wants is a procedure which tries to stampede the Senate and the Congress into some sort of an action. I am hopeful that it is not successful but sometimes I am not too sure, because I know that our Appropriations Committee meetings are set up on fairly short notice and then a ream of calls come in and we like to return our calls. We like to understand what the issues are and it is fairly short and it is very complicated and if you are in the Senate, every TV station has your home number, and there are a lot of calls that come in about midnight, not for interviews but for lobbying. That is all right, except it is hard to get the calls but it is pretty tough to have to make a decision and I, for one, consistently vote against using the Appropriations Committee to cut off funds because I do not think it gives enough time for consideration of the substantive issues. We are doing that today and we will have to find a line somewhere, but I am hopeful that we can do that.

Mr. ANSELMO. Did you hear the statement that was just made here, Senator? The effect of that statement was, when you write this legislation, remember, make those limitations only apply to the other guys, not to us.

Senator SPECTER. I hear that all the time.

Mr. ANSELMO. We have that in our society and that is what we have to stop doing. Just let it be fair for everybody and we will all make our way. Right?

Senator SPECTER. We hear that all the time—cut out the deficit but leave our appropriation intact.

Mr. ANSELMO. Do not get on to that one.

Mr. HUBBARD. Mr. Anselmo, I did not say that.

Mr. ANSELMO. That was the effect of your statement.

Mr. HUBBARD. No, I did not say that. I said that the very nature of direct broadcasting is nationwide.

Senator HATCH. Let us have Senator Specter and then Senator Denton will make a comment and then we will go to the next panel.

Senator SPECTER. I would like to come back to a point made by Mr. Fritts and Mr. Erlick, if I understand what you are saying, that both of you gentlemen, as I hear you, say you would accept a percentage cap on audience reach, as the Congress may draw its conclusion. Are you saying that if the Congress draws a conclusion about a 25-percent cap on audience reach, you would find that acceptable? I have also heard you say, Mr. Fritts, that you are not taking a position as to any specific figure, but you are looking to the Congress to come to a conclusion.

Mr. FRITTS. Senator, our first preference would be that the expert agency in this area, the Federal Communications Commission, set those limitations based on consultation and oversight with the U.S. Congress.

Mr. ERLICK. I would support what Mr. Fritts just said. I think that it might be helpful to provide just a little insight here. I think some figures were used this morning that are not entirely accurate. If you use ADI figures, you find Metromedia somewhere around 23 percent plus, the three networks somewhere around 20 percent, and they go down from there.

Mr. Valenti used a figure of 34 or 35 percent as being potentially achievable if the top 12 markets were actually bought by any one group. That is not correct. In the first place, no existing broadcaster could own both New York and Philadelphia because there is an overlap. You know that, I am sure, Senator Specter.

Second, you could not own Detroit and Cleveland, so you automatically would eliminate from those markets that percentage, which brings that figure down to somewhere around 32-plus percent. So what we are talking about is a potential of somewhere between the 20-odd-percent network level, the 23-plus-percent Metromedia level, and the 32 percent in the unreal world which presumes that some buyer would be able to buy a station in each one of those markets in that order of priority, which simply is not—you know, that is not the real world. It is not going to happen.

So the boundaries are rather clear, I think. And the other point I would like to make which Bob Taft made earlier and I would just like to emphasize and agree with him—the concept of reach is really pretty artificial.

Senator HATCH. May I interrupt you for just a second, with your permission?

Mr. ERLICK. Yes, sir.

Senator HATCH. As I understand it, CBS owns and operates both New York and Philadelphia.

Mr. ERLICK. That is grandfathered, Senator Hatch. That is because it was a grandfathered situation when the rules were adopted. What I am saying is that other than that grandfathered situation, it could not happen again.

Senator HATCH. I see

Mr. ERLICK. Now, audience reach is a rather artificial concept. If you are just talking about reach and you talk about a radio clear channel station such as WGN in Chicago, 720, I think on the dial, that station, if you just use the term "reach," at night where the signal bounces off of the skywave and goes on out across the country, probably reaches 200 million homes. That is to say it bounces off the roof of 200 million homes. But that really is a pretty artificial concept because the only real test is listening or viewing.

So when you reduce the reach figure to the number of people who are actually viewing, you would find that the network owned stations as a group, as an aggregate group, was say a 15 rating in prime time, you are talking about 5 percent of the television homes. Now, I have seen some figures that we are going to expand 140 percent or this percent or that—what we are talking about is an audience of 5 percent of the television homes.

Now, if you in your wisdom think that pushing that up to 6 or 7 or 8 percent is going to create some sort of automatic dominance and all these domino theories take place, then so be it. I cannot agree with that. We do not see it that way and I would suggest that if you look at the figures which relate to actual viewing in terms of the competitive world in which we live today—and that Fortune article will spell it out for you—what you are talking about is a viewer in a market who has a myriad of choices.

In my home town of Rye, NY, I have a 36-channel cable, I have every phase of service, I have got all the local stations, I have got PBS, I have got Mr. Turner's TBS and CNN—all of those things available

Senator **Specter**. Mr. Erlick, if we all had your choices, what would the network share be?

Mr. **Erlick**. It would be we estimate—and these are three estimates that have been made independently I can give you—I would be happy to—not ours, I might add—somewhere between 60 percent share on the bottom side and a high 60 share by 1990. So what we are talking about——

Senator **Specter**. That is a very important consideration, because we are talking about cable which has not come to much of America.

Mr. **Erlick**. Cable is now in about 40 percent of the homes. It is estimated that that figure should go to 60 or 65 percent by, say, the latter part of the decade. And based on those projected estimates of growth of cable and of these other 300 more commercial television stations——

Senator **Specter**. Do you think the three networks will still keep 60 percent of the market?

Mr. **Erlick**. Approximately. We hope so. If we cannot, it is going to be a very difficult business and that is again a reason, a fundamental reason why we should not be discriminated against in attempting to keep pace with what is clearly a communications revolution. If the ABC Network in the early fifties and sixties had not had the income from its owned stations, you would probably not have had a third network in this country today, and that third network, I suggest to you, has been a very favorable procompetitive force in communications in this country. And if there is a fourth network possible, so be it, we are all for it. That is the way we grew up and we hope other people can grow too.

It does not make sense to say to us you have to live by one set of rules but the rest of the world lives by another.

Senator **Specter**. Mr. Erlick, when you were commenting before about the quality of news, were you suggesting that news is a loss leader for the network? Do you lose money on your network news?

Mr. **Erlick**. I am not suggesting that. I am stating it. It is absolutely so. I would just make this further observation: Some people——

Senator **Specter**. A lot?

Mr. **Erlick**. It is a lot. Some people assume that sports is a very profitable portion of the network operation. It is not.

Senator **Specter**. You lose money on sports?

Mr. **Erlick**. Well, I would rather not quite say that, but it is becoming marginal.

Senator **Specter**. What do you make money on?

Mr. **Erlick**. Daytime. Network television, if it were not for daytime——

Senator **Specter**. Televising——

Mr. **Erlick** [continuing]. Television would be a very poor business. Nobody——

Senator **Specter**. And your TV stations.

Mr. **Erlick**. Pardon me?

Senator **Specter**. And your TV stations.

Mr. **Erlick**. Exactly. Nobody in his right mind, no businessman, without the revenues from daytime television, would invest the kind of money we have to invest in providing the American public with the program service that we do, news, entertainment, information, sports, and the like, if it were not for the profit potential of daytime television. And I tell you, gentlemen, you must look at the reality of the situation.

It is wonderful for Jack Valenti to come in here and tell you, you know, how you should regard the networks. And I am not—you know, he has the right to tell you anything he wants to—wonderful. But I am telling you from the vantage point of a man who has been in this business 35 years and grew up with ABC, I know this business, and I tell you, you are playing with fire if you start cutting the networks out of the herd and saying that they ought to be on some kind of a different ground rule.

Senator **Specter**. Mr. Erlick, you also testified—and I do not have your precise language—about the percentage of costs of production being higher on gross—what was that concept?

Mr. **Erlick**. I said, Senator, that since 1976—these are FCC figures, by the way, except the last figure which is a Fortune figure. I said that network income as a percent of revenue had decreased from 14 percent in 1976 to 8 percent in 1983, and that is because program costs have risen over that period of time at a higher rate than revenues have risen.

Senator **Specter**. While your percentages are down, is your total net down as well?

Mr. **Erlick**. No, sir. I am using the percent of sales as a benchmark and fortunately our net is up. Otherwise we would not be able to pay $225 million for Los Angeles Olympic Committee rights and take the gamble that that meant, plus another $100 million in production costs to bring that event to the American public.

Now, one of the things that enabled us to do that is the security and the knowledge that we have income and revenue from those owned stations. The network business is in many respects a very different gamble and please recognize that when you start evaluating this problem.

Senator **Hatch**. Senator Denton?

Senator **Denton**. Mr. Erlick I must say I identify with many of the principles and much of the narrative about ABC and the gnashing of teeth about unrealistic and vague restrictions on free enterprise. But you made a very fervent case for the public being the best informed and receiving the most news. I am not speaking for myself when I say that there is a vast segment of our population which thinks that the three networks represent a relatively uniform point of view as brought up by the Lichter-Rothman surveys which deals with the mind sets and lifestyles of the "media elite." I am not talking about the reporters. I am talking about those who reach the top which, like in Government, that are tempted with various propensities.

I do not say I would be any better or worse than any of them. I do not know. I do say, however, that there is a question on the minds of many Senators about the effect of television on the perspective of our national security, the respect for informed and mandated authority to undertake to direct the course of our foreign relations and whether the three networks have had a good or bad effect on these matters since 1967.

Frankly, I am one who thinks they have had a bad effect. General Westmoreland has a suit against one of the major networks. That suit might or might not be appealed. There are many people who do not necessarily agree with the slant taken by these news programs. I would, therefore, like to see many more originators of news. That is what the writers of the first amendment had in mind. Some Senators worry about the power that is invested in three major networks and we would be hypocritical if somebody did not say that.

My position on this issue is going to be somewhat influenced by this concern.

Mr. **Erlick**. I understand your point of view.

Senator **Wilson**. Mr. Chairman?

Senator **Hatch**. Senator Wilson.

Senator **Wilson**. I will make this very brief because I know that we have to hear from Mr. Turner and in fact there are other obligations that are interfering now. But in response to Senator Specter's question to Mr. Erlick of what would the market share be if indeed we all enjoyed that range of choice that he enjoys at his television dial, I thought I heard him respond that for his network, ABC, income as a percentage of revenue had dropped in some recent period from 14 to 8 percent.

Mr. **Erlick**. No, sir, I did not say that. I said that that was an aggregate figure for the three networks.

Senator **Wilson**. The three?

Mr. **Erlick**. Yes, sir. We do not break that out on——

Senator **Wilson**. What I wanted to do was simply suggest that perhaps the revenues are increasing substantially based on what I am seeing here in the Television Digest. Here is a report of July 30, 1984. This just briefly, Mr. Chairman, states here is the way the networks fared. ABC had pretax profits of $210 million on $1.861

billion revenue in 1982; for 1983 pretax profits totaled $235 million, revenue $2.073 billion. They go on to give CBS.

But this is the thing: If I understood Mr. Erlick correctly, I want him to take heart. I know that he is here today representing not only ABC, but NBC and CBS. One of his friendly competitors whom he is representing today, NBC, apparently is taking a more bullish look at the future. This is a news release which NBC has put out. It says:

> Today, the commercial television networks are the largest and most dynamic entertainment, information and advertising medium to ever exist, and they will remain the dominant communications medium of the future. This evaluation of commercial network television was documented in a taped presentation, "The State of the Media," introduced by Raymond Timothy, President, NBC Television Network, to representatives gathered for the annual NBC Affiliates Convention.

I will not read all of it, Mr. Chairman. I will just close with a couple of observations made by Mr. Timothy to document his optimism. He said, "Optimism for the future is based on three fundamental reasons. Cable has not demonstrated its viability as a mass advertising medium; commercial networks enjoy superior distribution, a three-to-one advantage over cable; and commercial networks have a continually expanding viewer base, which is the most important measure of success to an advertiser." And to document that, he pointed out that, "In 1981, over $10 billion, or 55 percent, of all national advertising dollars were spent on network and spot television, over $5 billion was spent on network television alone. That was in 1981. By 1990," he predicts, "television advertising revenue will grow to over $30 billion annually. And while cable will enjoy the largest growth rate, the 10 percent growth rate for the networks and affiliates will produce over $25 billion of that $30 billion in advertising revenue by 1990."

Mr. Chairman, I would ask that this be inserted in the record.[1] I think it is pertinent to the observations made by both Mr. Erlick and the question asked by Senator Specter.

Senator WILSON. Mr. Chairman, I regret that I have another obligation and have to depart. I will just conclude by repeating what I said earlier. I am encouraged to hear Mr. Erlick, representing all three networks, say that they have no objection to a reasonable limitation upon the growth of all the networks, the existing actual networks and the ad hoc networks. I think that what we have proposed is precisely that. I think it is reasonable.

I would be happy to discuss further the concept of reach as a proper measure. Here we are using both reach and number for the reasons that I indicated in my own testimony. And while it is possible for WGN to perhaps reach Sydney on a given evening at 2 in the morning, I think what we are concerned about is prime time.

Senator HATCH. Without objection, we will place that statement in the record.

Senator WILSON. Thank you very much, gentlemen, all of you for being here.

Senator HATCH. I want to thank each of you for being here. This has been enlightening I think to everyone who has sat and listened to it and we appreciate the testimony you have brought and we thank you for coming.

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[1] Can be found on page 308.

Mr. **Anselmo**. Thank you, Mr. Chairman.

Senator **Hatch**. If we can have order, our next witness is Mr. Ted Turner, chairman of the board of Turner Broadcasting System, Inc., out of Atlanta, GA.

Senator **Wilson**. Mr. Chairman, if I may, I would like to apologize to you and also to Mr. Turner whom I had hoped to hear. Mr. Turner, I regret that I have an office full of people waiting for me and I will read your testimony and perhaps I can talk to your about it later. Thank you.

Senator **Hatch**. If we can have order. Mr. Turner, we are really happy to welcome you to the committee. We admire you and appreciate the time that you have spent here today and we are sorry that we are getting to you so late but, as you can see, it is a hot topic and very difficult to push alone.

STATEMENT OF TED TURNER, CHAIRMAN OF THE BOARD, TURNER BROADCASTING SYSTEM, INC.

Mr. **Turner**. Mr. Chairman, I want to thank you and the other members who are here present for holding these hearings today and reviewing the FCC's action to deregulate the broadcast television business. I appreciate your valuing my opinion enough to ask me to discuss this issue.

I, of course, have submitted lengthy written testimony. I do want to say that while I have to question Mr. Valenti's motives because he is really representing, like we all are, selfish interests, his overall points about the increase in network power that can occur from this deregulatory move of the FCC are correct, and I think this has very dire consequences for this Nation.

I guess we are the only company in the business that really has attempted to compete head to head and toe to toe with the three television networks. Just about everyone else who was on the previous panel has network affiliated stations and thus cooperates with the networks. Even Metromedia has an ABC station in Boston. If these regulations are lifted, broadcast stations will be worth more because the big companies will be able to buy stations in markets from which they are now excluded by regulation. So the resulting bidding will increase station prices because people who are currently at their station ownership cap, like Taft Broadcasting and ABC, will want to buy more stations, and it will make independent stations more valuable.

So even if someone chooses not to sell a station, this deregulation will benefit every television broadcaster by increasing the value of his facilities, wherever they are.

Like Senator Denton—and I appreciate your staying, sir—I would take issue with the comments of some of the previous speakers about how we have the greatest television system in the world. I think we have the greatest quantity of television in the world. I think we probably have the worst television quality in the world.

We have a wonderful nation, and for these people to hide behind the first amendment is a fraud. I think Thomas Jefferson and George Washington and the people that drafted the Bill of Rights and the Constitution would be outraged. You see, there were no motion pictures and no television in their day. They were talking, when they said freedom of speech and freedom of the press, about handbills, and your ability to say whatever, to express yourself freely. They were not talking about pornography or the excessive and gratuitous violence that fills the television and movie screens of our Nation. And if they saw what was going on today and the people that were hiding behind that first amendment, I think they would throw up. They had a slogan. You do not see that slogan on CBS, NBC, or ABC, "In God we trust." No, sir. It is in the almighty dollar that they trust.

I really believe that the three networks—I know because I am in the television business, have a dramatic effect on society. The educational system, our Government do not have as great an influence on the people of this Nation and our young people that these television networks do, and I can tell you they do not care what they put on.

All they are trying to do is gather as many viewers in front of the television set to watch their programs as they can. Then they sell these viewers for a few cents per thousand to a bunch of advertisers, and that is all it is, the more viewers the more dollars they can get.

All the talk about their profits suffering from competition is ridiculous. Their profits are at an all-time high. For 8 years everywhere I can I have tried to compete with them and all we are barely doing is keeping our head above water. Their market power today is as great or greater than it has ever been. Every time I try and bid on a program, or a sports program, they get it. Of course, sports programming is not as profitable as it was because I have bid on baseball and on the NFL and on the USFL and pushed the price up, but they just overbid me and then they just, because of their market power, increase their advertising prices. This is not a competitive business.

It is one thing to deregulate airlines to allow competitors to come in. Deregulating television ownership is not going to make more competitors and add more voices. It is going to produce fewer voices because the big guys are just going to buy up more of the small guys. There are only a limited number of these VHF facilities in the marketplace.

I really fear for the country if we give the networks more power—I mean look at the way they did the conventions this year. They only ran 2 hours. They are supposed to compete with each other, but was it not interesting that all three of them began at 9 o'clock and all three quit at 11—a common arrangement. They all were talking with each other. If one of them had carried, like CNN did, the daytime activities of the Democratic and Republican Conventions, it would have made the other two look bad. They are all right in the same corner. They can look across the street at each other. They even had one representative of ABC represent the other two of them here. They are not competitive. They are all three in the same boat.

I could go on forever, but do not give them one single thing. In Japan, no one is allowed to own more than one station. I think what you ought to do is make them divest the other four that they have. Do not let anybody own but one station in this country. That would be a hell of a lot better for fostering diversity. Just do not let the bad guys get more powerful. Save a little power for the Government, and those who were elected. [Laughter.]

Senator HATCH. Like the others, you feel fairly strongly about this issue. I think everybody here is concerned about this power. You know, the Justice Department, the Antitrust Department seems to be only concerned about economic power and unfortunately we in the Congress have to look at a few things beyond that.

And one thing has come forth today and that is that there may need to be some legislation in this area. Now, let me ask you this: Is not CNN, owned by you, considered a viable alternative to the news dominance of the three networks?

Mr. TURNER. It is not financially viable.

Senator HATCH. In other words, you have a rough time competing with the news dominance of the——

Mr. TURNER. Absolutely. For instance, the market power that they have with the advertisers and the advertising agencies is just incredible. I mean it is hard to figure. For instance, we have got about a 15-percent share of the total number of hours spent viewing network news, and the network news market is about a billion-dollar market. If we had our share of the dollars, we would be doing about $150 million. Instead, this year we are going to do less than around $40 million, about one-fourth the share of the dollars that we have against the amount of time we are actually viewed.

There is such discrimination against the cable networks on the part of the advertisers. It is just like with our baseball games, they say, well, we will only take half as much per viewer because NBC says if we want to buy the World Series we have to buy Saturday baseball. So Budweiser pays them $8 and then they say to us for our baseball, we want to give you $3 on a cost per viewer basis. We are hanging in there and we will still be around, but it is very difficult. You heard what these guys said. They said without daytime television they could not make it. The $2.5 billion that ABC is going to do this year, they could not make it without their nudity and the sex and the soap operas that they run in the daytime, which is the filthiest programming that is on. That is what is keeping them going. They said they could not have a news operation. I just cannot believe it. When I asked them if they were making money on news, Mr. Erlick, or somebody, said that they are losing money on news.

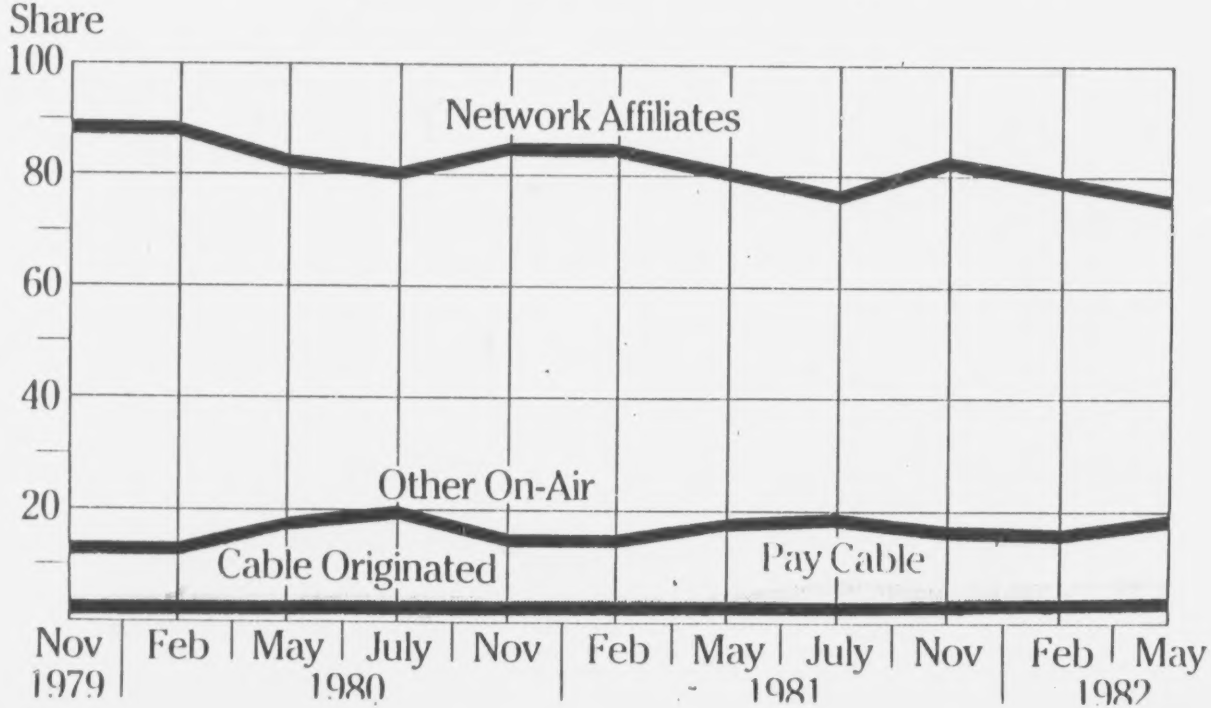
If you saw the figures, I think you would find that is just an outright lie. If they are losing money on news, why do they not cancel the news? They cancel any other programs that they do not make money on. [Laughter.]

Senator HATCH. Well, I have heard that they want to expand to an hour of news but the affiliated stations will not permit it. Am I wrong on that?

Mr. TURNER. The affiliated stations are scared of the networks and that is the reason they do not want the networks to take more of their time. If the networks want to run news in prime time, there is nothing stopping them from running 1 hour of news or 3 hours of news if they wanted to, if they started at 8 o'clock.

Prime Time Share of Audience

National Average
(Homes #1, 2 and 3 Combined)



Towards 1990

The effects of the "new technologies" on 1990 viewing patterns will be determined by three questions relating to these homes.

> How many of each type of home will there be?
> How much viewing will the average home do?
> What share of that viewing will each service have?

How Many Homes?

The nation is expected to have a total of 99 million television households by 1990, compared to 80.4 million in 1981 -- or an increase of 18.6 million.

Here is how that universe will be distributed:

	1990	
	Number	Percent
Home #1	44,600,000	45%
Home #2	14,800,000	15%
Home #3	39,600,000	40%

How Much Viewing?

It can be assumed that the increasingly broader canvas of program fare available to a growing percentage of viewers will continue to increase set usage. This effect is already clear in that Home #1 views 12% more than Home #2 and 13% more than Home #3. Another indicator is the fact that An all time high viewing level was reached in 1981.

CBS expects a 62.6% level of prime time usage in 1990 (up 5% from the 1981 figure of 59.4%):

HOMES USING TELEVISION	
Home #1	67.3
Home #2	59.4
Home #3	58.4
National Average:	62.6

What Share Will Each Source Have?

This is the heart of the competitive question. Attempts to predict individual competitive standings for specific programs or program categories -- some of which do not yet exist -- lead to obvious difficulties, even within the familiar confines of commercial television.

But, as already shown, there is a considerable behavioral history for each programming source, in each type of home. And the general characteristics of each source are evident -- how it approaches the marketplace and the implications of that approach.

These characteristics are worth closer examination since the share each source is getting -- and will get -- has much to do with the share each source seeks.

Network Affiliates

The prime time share for network affiliates will go from 80% today to 70% in 1990. This decline will primarily be the result of homes moving from "broadcast-only" (or Home #3) to the "pay cable" category (or Home #1) as cable penetration increases.

But, growth in television homes will more than offset the decline in share. Actual homes delivered will increase by 5,000,000. The networks will reach audiences more than twice as large as all other sources combined.

There is no doubt that the networks will have to share the television screen with new and growing competitors. But they will continue to play the leading role.

Pay Cable

Pay cable's share of viewing will increase from 4% today to 11% by 1990. This gain will be largely attributable to increased penetration (as pay reaches 45% of television homes). However, an increase in multiple pay households (homes subscribing to more than one pay service) will add to this growth.

Pay cable has gone after a market that partially overlaps that of the networks. Feature films are the original mass appeal entertainment form, and pay ratings reflect this. The problem lies in supply.

The output of feature films in America has averaged 250 hours per year for the past 20 years. Its impact on 3,300 hours of network prime time programming is limited by that fact.

As the pay services move from exclusive franchises to head-to-head competition, and as new competitors such as subscription television, multipoint distribution systems, direct broadcast satellites and others compete for access to theatrical films, the drawing power of each individual pay service will be weakened.

For pay cable to effect a major increase in position, another production source must be developed.

The alternative is for pay to become its own production source, as did the networks, which attract large audiences and are advertiser-supported. However, the economics of doing this are not encouraging for cable. It would require an enormous increase in costs with no indication of a corresponding increase in revenues, unless advertising is introduced. This is risky for the whole structure.

If pay cable chooses to produce original programming, it must establish and maintain a program development process. In order to fund successes, it must be able to fund failures.

So long as feature films continue to be the staple pay attraction, the likelihood is that the pay share will remain relatively stable.

Cable Originated

Cable originated (or "basic cable") will increase its share from 2% today to 5% in 1990, primarily because cable penetration will increase to 60% of all television homes.

However, the size of the audience of each individual service will remain small, due to their specialized nature.

Non-pay programming originated by or for cable systems is a relatively recent phenomenon. There are now some 35 cable networks either in operation or announced. There is also local programming, generally devoted to community activities.

The cable networks are "dedicated" sources -- that is, they appeal to homogeneous interest areas or groups such as sports, music, business, news, culture, health, foreign language groups, religion and the like. The measurements available on viewing show shares in the area of one or two percent for the more successful services.

These cable networks are analagous to magazines. As such, they will compete in a highly developed marketplace, targeting to attract the non-viewer or light-viewer.

With such specialization and small audience bases, all 35 services simply cannot survive.

The total revenue available to them by 1990 is expected to be about one-fifth of that generated by the broadcast networks (and divisible by the number of surviving cable services).

This has obvious implications in terms of how they can compete for programming and what services they are able to provide.

Other On-Air

Other on-air -- a collective term for independent stations, PBS and so-called superstations -- will be at an 18% share in 1990. The collective penetration of this source will reach 95% of all television homes.

These outlets basically recycle popular entertainment fare. The major share of programming has been off-network product, older movies and local sports. The main competitive effect of these schedules has already been felt. Therefore, the growth of other on-air will come from increased penetration, not from increased popularity.

The big challenger to the independent television stations is cable. Many major market sports franchises are gradually switching from independents to cable, and many classic films are being withdrawn from syndication in favor of pay cable and cassette. In the future, it is expected that major off-network programs may go directly to cable as well.

Such shifts of programming from independent stations to cable will provide more available audience for network affiliates.

Share Assumptions for 1990

	Prime Time Share of Audience National Average	
	1981	1990
Network Affiliates	80	70
Pay Cable	4	11
Cable Originated	2	5
Other On-Air	18	18

Note: Source for 1981 shares on this and following pages is N.T.I., Feb., 1981; May, July, Nov. 1981.

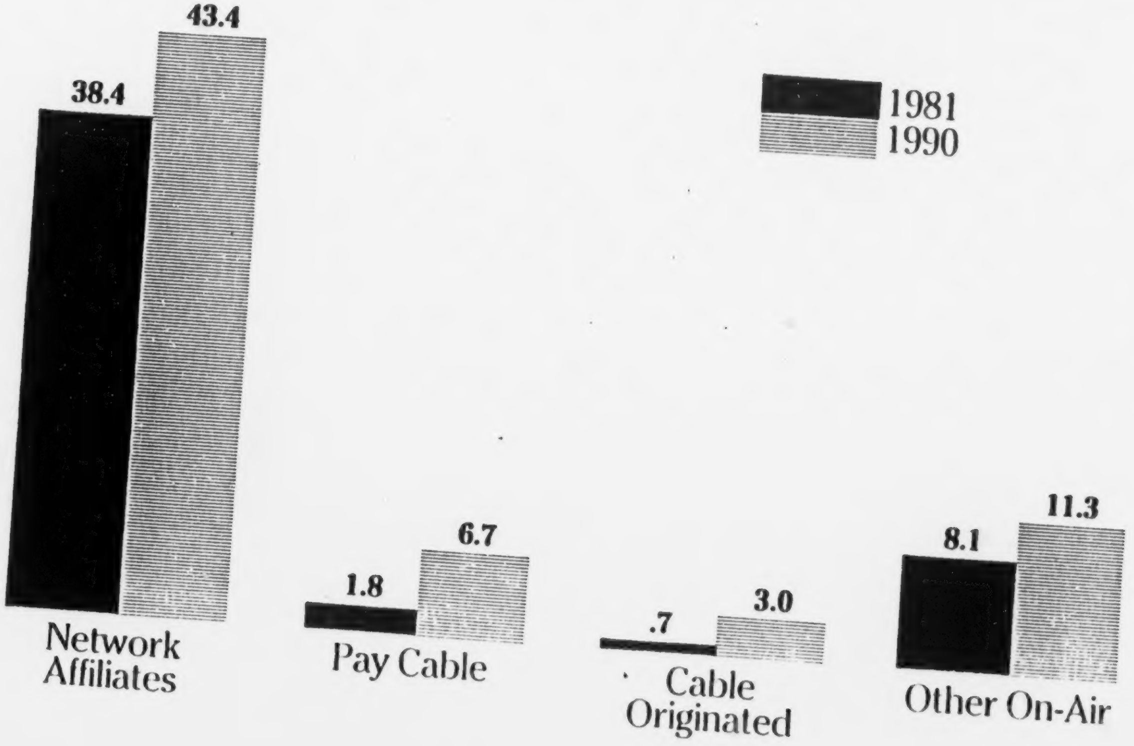
Homes Reached in 1990

These shares, applied to penetration, homes and usage data, lead back to the bread-and-butter number for everyone: actual homes reached. Even with a share loss for the network affiliates, and gains for the other sources, the network homes delivery is more than twice the size of all other sources combined, and the actual network gain -- 5,000,000 homes -- is the largest of any source.

	Prime Time Homes Reached	
	1981	1990
Network Affiliates	38,400,000	43,400,000
Pay Cable	1,800,000	6,700,000
Cable Originated	700,000	3,000,000
Other On-Air	8,100,000	11,300,000

Prime Time Homes Reached

(in millions)



Economic Outlook

Another way to consider the relative potential of the major sources is to compute their likely 1990 revenues.

The share of the economic pie garnered by each competitor will largely be determined by that competitor's share of the television audience. While revenues may vary with circulation, program costs do not. To compete in a given program category is to pay the going market price. Thus revenues control competitive options.

CBS estimates the following revenues returning to these program sources by 1990:

	In Billions
Ad Cable	$2 - 3
Pay Cable	$6 - 8
Networks	$15 - 20

It should be noted that, while the network number is divisible by three, the other totals will be fractionalized much further.

Note: Local cable advertising is estimated at $500 million to $1 billion, compared to $18 billion for commercial television stations.

How many channels will a viewer actually watch?

A critical question for the entire 1990 scenario is, despite the growing number of program sources and channels, how many channels will actually be watched?

Here again, Nielsen has hard data about viewer choice limits. In a March, 1982 measurement, it found:

° Homes capable of receiving up to 10 channels actually tune-in only 5 of these channels 10 minutes or more per month.

- Homes capable of receiving 20 or more channels (a fairly typical cable home) actually tune-in only 8 channels 10 minutes or more per month.

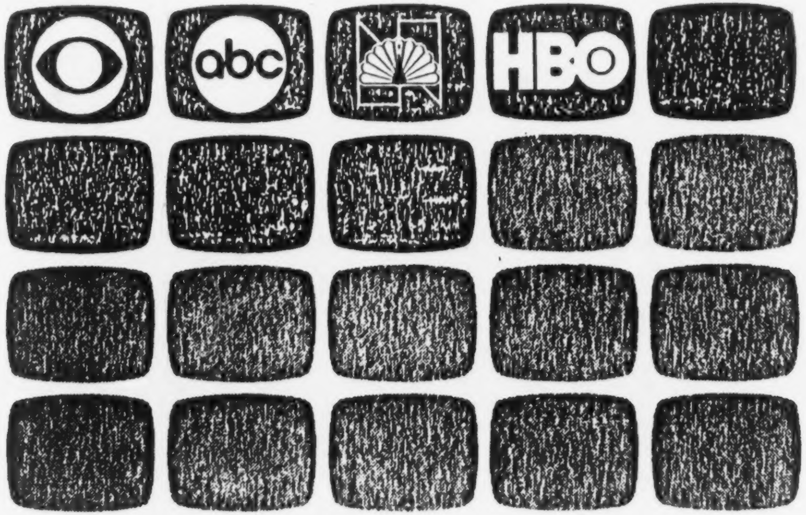
This means only about one-third of the programming sources available to that home are tuned to during the average month (and note that these choices were measured if only watched 10 minutes or more over an entire month).

The significance of this limited viewing pattern is apparent when one takes into account the fact that virtually every one of these households spends some time viewing the three networks and, probably, one pay service each month.

All other sources -- including basic cable networks, independent television stations, PBS and other pay services -- will be competing for those four other viewer choices.

It is apparent that this will lead to fallout in the competitive program marketplace.

Homes able to receive 20 or more channels watch only 8 channels for 10 minutes or more per month.



We know what four choices are.

All other services—cable, independents, PBS, etc.—will compete for the other four channel selections.

To Sum Up

There is a notion that the era of "new technologies" represents a kind of electronic land-rush in which hordes of settlers will swarm over the same patch of homesteader territory.

In fact, it is an important -- but not radical -- redistribution process whose outlines are already apparent.

Rough boundaries have been drawn. How well each source performs will be a function of how well it understands and relates to its market.

In any event, all program sources will face one underlying reality. People do not watch cable, or pay cable, or networks, or stations, or satellites, or STV or MDS, or discs or cassettes. They watch programs.

In that sense, nothing has changed.

ATTACHMENT 2

JOHN C. SEVERINO

PRESIDENT, ABC TELEVISION

BROADCAST ADVERTISING CLUB OF CHICAGO

November 17, 1982

I'd like to thank all of you for giving me an excuse to be in the city I called home for five years. I still get occasional attacks of nostalgia for Chicago. One was triggered not long after I was transferred to New York to assume my present job. On the first cool day, I put on a raincoat, which I hadn't worn for the seven years I lived in Los Angeles, and in my pocket, I found my business card from WLS-TV. It brought back a wave of memories: of good friends -- many of whom I'm flattered to see here today; of the tremendous opportunity I was given when Dick O'Leary picked me to manage WLS; and of real Chicago pizza at Uno's, so different from the awful stuff they make in New York.

I have a theory that people who don't like Chicago don't really understand America -- and certainly don't understand American politics. Whether Jim Thompson or Adlai Stevenson ultimately ends up as governor, some things never change. In fact, I heard on the way over that things have gotten even more complicated. Apparently someone broke into the Election Commission last night and stole the results of next years' elections . . .

Oh well, politicians come and go, but Cook County goes on forever. Something tells me that Severino is going on forever . . . Maybe you'd rather hear about the new television season.

Are you sure you wouldn't rather hear about some of the great times I had when I lived in Chicago?

l -- if you insist on knowing whether the new season is a success, I'll have to give it to you straight -- we don't know.

The launch of the three networks' new schedules was confounded, as usual, by the baseball playoffs and the World Series. Whether we like it or not, in October, baseball comes first. The NFL players' strike was another disruption. And an off-year election waited in the wings.

As a consequence, a number of network shows did not premier until the final week in October. So, in reality, the fall season is barely three weeks old. And we are just now approaching the point where we can begin to make some judgments about the season . . . about which programs are working and which, unhappily, are not.

In the latter category, we know that CBS replaced all its programming on Wednesday night between 9:00 and 11:00. We knew that ABC's performance on Friday night between 9:00 and 11:00 was very disappointi and we just announced that we will be replacing "The Greatest American Hero" and "The Quest" in December with movies. We feel this will help revitalize that night.

We also know at this point that viewing levels for the three networks are down on Monday and Friday nights. We believe the fall-of on Mondays is directly attributable to the absence of Monday Night Football. On Fridays, the 'why' is still a mystery, and we'll have to wait until the season is further along to make any real judgments. Ou best guess right now is that stronger independents and free promotiona movies on HBO and Showtime may be having an impact. In the absence of NFL football, we also suspect there may be greater audience interest in other sports programs like boxing on ESPN.

hout saying that critics of the industry are going to tea leaves. We would be disappointed if they did not h dire warnings that any fall-off in viewing, however another sign that the demise of the networks is fast ching.

Doomsday theories about network broadcasting have been plentiful ever since the days of Kukla, Fran and Ollie. Broadcasters and advertisers are regularly warned that the public can't wait to abandon network programs to tune into cable or play Super Invader.

We all know there are now more alternatives to the offerings of the three networks than previously existed. But by no stretch of the imagination does it follow that competition will doom the networks. Quite the contrary. Competition can be an incentive for us to be more imaginative and to improve our performance.

But I feel very strongly that it's time to stop underrating the performance of the three television networks . . . to stop undervaluing their positive contributions. I think we have to come to terms with a fundamental reality . . . to accept the fact that network television is our only truly national medium . . . a medium with such enormous reach that it has assumed a unique place in our lives. As a society, we've never quite been comfortable with that. However, it's time to make our peace with the medium . . . to recognize the good the medium does.

Network broadcasting is the dominant source of news and information in American life, and the primary source of entertainment for most Americans.

ery day, network television programs convey a constant stream of messages to the American public -- messages that involve our attitudes and values and lifestyles as a people. In view of this, it is hardly surprising that the industry is the focus of endless attention.

Television's impact on our lives goes far beyond entertainment and information. It has become America's new melting pot -- a common crossroads of experience that is shared every day by people in every corner of the country. It has largely put an end to geographic isolation and considerably diminished regionalism. It makes California comprehensible in Chicago and New York -- if such a thing is possible.

And yet -- far from shrinking the diversity of American life, as some claim -- I think that television is increasing that diversity. Through 15,000 hours of programming by the major networks each year, television provides Americans with access to new experiences and new understanding that didn't exist 30 years ago.

Think about "Roots," for example, and the way that series introduced millions of Americans to the history of Black America. For many white Americans, it offered perhaps the most tangible and powerful insight of their lives into the experience of being black.

February, ABC will feature an 18-hour mini-series based on Herman Wouk's "The Winds of War." For many younger Americans who have no memory of World War II, this series will provide a window into the experiences that shaped the lives of their parents . . . and into one of the most important periods of our nation's history.

"Winds of War" is a $30-plus million investment in our medium. It is television on a grand scale, the product of over 200 days of shooting at 400 locations, and involving 285 speaking parts. "Winds of War" is an epic feature film which was made for television.

I'm not here to deliver a Chamber of Commerce booster speech on the patriotic glories of network television. But I do think it is time that we accept the contributions that television makes to American life, and to value their importance.

Television in this country holds a position that's unique. It serves an audience whose breadth and depth is unmatched . . . in sheer numbers, and in interests and background. We are a pluralistic society, and as a country, that's a major source of our vitality and greatness. It is this same energy and vitality the three networks try to bring to the medium.

This commitment is evidenced in ambitious event programming like "The Thorn Birds" and "The Blue and The Gray," and in the excitement which surely will accompany the 1984 Olympics.

The bottom line is that the overwhelming majority of Americans like network television. And we're working harder to keep their loyalty with good programming with wide appeal. The average American household today watches television for nearly seven hours, even in the face of heightened competition for viewer's time.

Nor are they simply passive consumers of programming. By the judgments they make at the channel selector, the public feeds back a steady stream of information that continously reshapes television programming to reflect the changes in their lives and interests. This pace of change demands three thousand hours of original prime-time network programming every year, at a cost of more than $2 billion.

But the payoff for responding to the public's changing taste is that network television works for you -- for our advertisers and their products. It is unmatched in performance for new product introductions -- as products like Lean Cuisine and Diet Coke bear out.

Network television is proving its potential for innovative advertising as well. When The Delaware Fund recently ran network spots with an 800 telephone number, its switchboard was so flooded by callers that the investment house could barely cope with the flood of inquiries. (Yes . . . they did increase their buy!)

Television programming is constantly changing and evolving. I left Chicago eight years ago. Today only a handful of the prime-time feature characters that appeared then -- Archie Bunker, the 4077th MASH unit, and the crew on Happy Days -- are still on network television.

In their place are characters and situations that wouldn't have been dreamed of then -- characters and situations that mirror the changes in American life. Divorce. Single parent families. Gritty urban crime and social problems portrayed without cosmetics.

And these changes have extended to news. The public's appetite for current information and analysis is reflected not only in the increase quantity of news programming, but in its growing quality and sophistication.

Today, national news is anchored in Washington and Chicago. Technolog and satellites allow for more broadcast time from foreign datelines. And as a measure of how important news has become over the years, one-third of ABC's schedule this year will be news and information.

News definitely seems to be one of the things the public wants. We were tremendously pleased to find we were number one in the ratings on election night -- a big first for a network that not so long ago came in 3½ in a 3 network race. But much more significant than our small victory is the increased audience in general. Viewers who watched these off-year elections increased by 20 percent over four years ago.

A good measure of the recognition of the current trend to more news is reflected in what you and your colleagues have been spending. Over the past five years, the advertising revenues for ABC News alone have risen 300 per cent.

The track record of the networks is one of innovation and responsiveness -- responsiveness to the needs of advertisers and the interests of viewers.

To those who rub their hands expecting the networks to finally get their comeuppance -- to those who tell us about cable and alternative viewing -- our reaction is straightforward: The three networks will compete. We will compete for viewers by providing the kind of news and entertainment programs that will attract the audience.

I don't think anyone seriously questions that cable is going to find a place in the broadcasting spectrum. But let's be realistic in our expectations and perspective. Total cable advertising last year amounted to less than two-tenths of one percent of all television advertising revenues, which is a real measure of the size and dimension of cable audiences.

It ought to tell us something that in spite of the competition from new media, network television continues to grow at record rates. I don't have to tell you how strong sales have been. But the important thing is that this bodes well for other businesses as well. Good network sales generally mean good spot and local sales.
The fact that upfront and first and second quarter sales are so healthy for us is a good sign, we feel, for better times ahead for the economy in general.

Now -- what about the future . . .. what will happen as the competing media grow? Let's put that into perspective as well. We expect both local and network television reveneus to grow from well over $12 billion today to $35 billion in 1990. We expect cable revenues in 1990 to equal about seven percent of that total, and pay cable revenues to reach about 14 percent.

Cable won't be the bulk of your spending. What cable will mean is enhanced targeting to specific audiences. Cable will be able to deliver the kind of demographics that only highly focused specialty magazines can provide today.

What cable also tells us is that we are going to leave the era of the single mass market. There will still be a mass market. But for advertisers and network broadcasters, it may look quite different. It may well be the market in which concepts are sold as often as products. We can get a sense of what this may mean from Cuisinart advertising. It doesn't sell a kitchen machine. It sells a whole range of new attitudes toward cooking.

But the mass market will be there in any number of forms. And network television will reach that market -- as it does today -- providing value to advertisers at costs that cannot be equalled by any other medium. Even if you take the most pessimistic forecasts of the three-network share of American households in 1990, network broadcasting will still reach more people every day than it does in 1982. And it will continue to do so more efficiently than any other medium.

And I think that -- as far as ABC is concerned, and I'm sure the other networks as well -- our track record in innovative programming and our scale of investment in programs makes any pessimistic forecasts unlikely.

In the face of increased competition, we will have to accelerate the pace of innovation. We will have to increase our willingness to take risks, and you as advertisers will be the beneficiaries.

Diversity will increase the value of television as a marketplace of ideas. And competition in programming will increase the quality and diversity of entertainment and news and information coverage available to the American public.

Television -- in itself an important and valuable force in American life -- can only become more important and more valuable. For broadcasters, for advertisers and for the public, the future promises to be one in which everybody wins.

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ATTACHMENT 3

NBC
Press Department/3000 W. Alameda Ave./Burbank, CA 91523

COMMERCIAL TV NETWORKS WILL DOMINATE COMMUNICATIONS MEDIA IN FUTURE ACCORDING TO "STATE OF THE MEDIA" DATA SHOWN TO NBC-TV AFFILIATES

LOS ANGELES, CALIF., MAY 17 -- "Today, the commercial television networks are the largest and most dynamic entertainment, information and advertising medium to ever exist. And they will remain the dominant communications medium of the future."

This evaluation of commercial network television was documented in a tape presentation, "The State of the Media," introduced by Raymond Timothy, President, NBC Television Network, to representatives gathered for the annual NBC-TV Affiliates Convention.

Data collected in the study, Timothy said, reconfirms RCA's and NBC's faith that "the future is not passing us by. The future is ours to take." The "lion's share" of the video business "will be our business," he said, "the network/affiliate partnership."

Optimism for that future is based, he said, on three fundamental reasons: cable has not demonstrated its viability as a mass advertising medium and, therefore, dependent on direct viewer support; commercial networks enjoy superior distribution (a three-to-one advantage over cable); and commercial networks have a continually expanding viewer base, which is the most important measure of success to an advertiser.

Supporting data revealed in "The State of the Media" presentation follows:

--Last year, television sets were on for six hours and 45 minutes each day in the average American home.

(more)

--On an annual basis, almost half of the homes in the United States watch network television during prime time. In the full 52 week 1980-81 season, nearly 40 million homes watched network programs during an average minute -- the largest audience in history.

--In the past decade, viewer choice has increased with 300 more television stations on the air and 6,000 cable systems.

--Networks and their affiliated stations are the only television source that can reach all homes.

--Cable systems which program movies lack variety and repetition is prevalent (during a six-month period, the three major premium pay cable movie networks showed "Superman" 53 times and "Rocky II" 44 times).

--Viewers who are given many channel choices choose to view only some of them.

--Despite the many other choices available to viewers, the three networks attract 50.5 ratings points -- more than half of all homes and more than an 80% share of the prime-time audience. Independents average a 7.8 rating and the basic cable networks split 1.3 ratings points 39 ways.

--Advertisers are not appropriating large amounts of money to cable because its effectiveness has yet to be demonstrated. WTBS, the largest cable-supplied advertising service, recorded an average prime-time rating of .7 compared to a 16.2 for the average network.

--In 1981, over $10 billion or 55% of all national advertising dollars were spent on network and spot television. Over $5 billion was spent on network television alone. Cable television advertising revenues were only $110 million or half of 1% of all national advertising revenue.

--According to NBC Corporate Planning, total television homes will increase from 81.5 million in 1981 to 96.3 million in 1990. The new competition will show dramatic growth in viewership but two of every three viewers will still be watching network prime-time programs in 1990.

--By 1990, television advertising revenue will grow to over $30 billion annually. Cable networks will have the biggest growth rate, but the 10% growth rate for networks and affiliates will produce over $25 billion in advertising revenue by 1990. Television networks and their affiliates will command over three quarters of all television revenues in 1990, according to studies conducted by NBC Corporate Planning.

# # #

ATTACHMENT 4

STATEMENT OF PETER H. LEMIEUX, Ph.D.
MASSACHUSETTS INSTITUTE OF TECHNOLOGY
DIRECTOR, INFORMATION ARCHITECTS
CAMBRIDGE, MASSACHUSETTS

I. INTRODUCTION

In its Report and Order closing Docket 83-1009, the Federal Communications Commission concludes that eliminating the ceiling on television station ownership, and in particular permitting the major television networks to expand their complement of "owned-and-operated" stations, would pose no threat to competition in the marketplace for television advertising.[1] In its Order the Commission correctly observes that "any review of the efficacy of retaining the Rule of Sevens must carefully examine. . .the advertising marketplace in which television and radio stations compete to determine whether altering the Seven Station Rules would present any danger of competitive harm. . . ."[2]

In making its determination the Commission relies heavily on an analysis conducted by the Antitrust Division of the U.S.

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[1] Federal Communications Commission, Amendment of Section 73.3555 of the Commission's Rules Relating to Multiple Ownership of AM, FM and Telveision Broadcast Stations, General Docket 83-1009, released August 3, 1984, slip op., pp. 23ff. Docket 83-1009, released August 3, 1984, slip op., pp. 23ff. (Hereafter Report and Order.) The rule states that no individual entity may own more than seven stations in any one of the three services, and with regard to television stations, no more than five of the seven stations may operate in the VHF band.

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[2] Id. at 23.

Department of Justice which concludes that "elimination of the seven stations rule will raise little risk of adverse competitive effects in any market."[3] The Department's reasoning can be summarized as follows:

1) Television advertising represents a "product" market distinct and separate from competing forms of advertising in media such as radio, newspapers, magazines, etc.[4]

2) The television advertising market is itself composed of two distinct and separate submarkets: network advertising, distributed over the three major television networks; and "spot" advertising sold by local broadcast stations or by their representatives.[5]

3) Advertising offered by the networks does not compete with spot advertising because "firms that market nationally are not likely to find spot to be an effective substitute for network advertising in achieving nationwide coverage."[6]

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[3] Comments of the United States Department of Justice in General Docket 83-1009, at 2. (Hereafter DOJ.)

[4] Id. at 10-13.

[5] Id. at 13.

[6] Id. at 14.

4) Spot advertising offered by stations broadcasting in one locality (a "geographic" market) does not compete with spot advertising offered in other localities.[7]

The Justice Department's first conclusion, that the qualitative aspects of television advertising set it apart from other media, is accurate. As the Department notes, television advertising appears to have a uniquely effective impact on potential consumers, and both advertisers and their agencies tend to view television as irreplaceable by messages that cannot employ both sound and motion. This implies that most advertisers would be unlikely to replace advertising expenditures for television with spending on other media.

The Commission's other conclusions, however, ignore an important element of the television advertising market, the "national spot" market whereby advertisers purchase spot time on numerous local stations throughout the country. Through this market local broadcast stations offer their advertising time for sale to national and regional advertisers. This transaction takes place through intermediaries known as national representative ("rep") firms. These firms deal directly with advertising agencies that wish to purchase advertising availabilities on one, or much more often, a number of local broadcast stations.

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[7] Id. at 17-19.

As the evidence outlined below suggests, national spot advertising operates as an important competitive check on network advertising prices, offering advertisers an alternative means to reach at least a share of the national audience when network prices rise too high. Permitting the networks to acquire additional local stations will significantly restrict competition in this national spot market, resulting in higher prices for both national spot time and network advertising time.

II. National advertisers consider the national spot market as an alternative to network advertising.

The networks, because they are the only entities able to reach a substantial share of the national television audience, are the "gatekeepers" to that audience. As a result, the networks are able to charge increasingly high prices for advertising time on network programs. National advertisers have become increasingly vocal in their denunciation of annual double digit increases in the price of network advertising. Moreover, in reaction to these trends, advertisers and their agency representatives have both indicated that they are turning more and more to the national spot market as a means of escaping network dominance.

One major example of this phenomenon was noted recently by Robert J. Coen, senior vice president and director of forecasting at McCann-Erickson Worldwide. He pointed to recent changes in Proctor and Gamble's advertising strategy as "evidence of resistance to double-digit [network] rate increases." Coen noted that Proctor and Gamble reduced its network television advertising expenditures from 68% of its total budget between October, 1981, and March, 1982, to just 56% in the comparable period a year later despite raising its total advertising budget some 30%. However, spot television expenditures rose 74% in this same period.[8]

Another senior advertising executive, Robert (Buck) Buchanan, executive vice-president of J. Walter Thompson Company, noted that his agency has purchased increasing amounts of spot time on independent stations because "the increase in network television prices [has] made spot TV attractive, particularly in the larger markets."[9]

There is also considerable evidence that recent network price cuts in the scatter market to sell off excess commercial inventory have had a direct and deleterious effect on spot advertising sales. At the end of 1983, agency executives told Broadcasting magazine that the networks were slashing prices on unsold scatter inventories by upwards of 25%. The effects on the national spot market of these price cuts were described as follows:

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[8] Broadcasting, January 2, 1984, at 63.

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[9] Id.

> Depressed network scatter prices and aggressive regional selling by the networks tend to hurt national spot business, and that is proving to be the case for the fourth quarter, report a number of [station] representative sources. They also report that national syndicators have been cutting their rates to remain competitive with (and cheaper than) the bargains being negotiated by the networks.[10]

While the national spot market traditionally operates through the sale of local time to national advertisers via station representatives, a fast-growing approach to national spot purchases is the so-called "barter" syndication market. Between the 1972-73 television season and the 1983-84 season, barter has grown nearly 1,600%, and is predicated to reach $1 billion by 1990.[11] In this approach syndicators strike agreements with local stations to carry a program which includes both national spot advertising, sold by the syndicator, and local availabilities sold by the broadcaster.

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[10] Broadcasting, November 14, 1983, at 31. These reports were confirmed by a story in Television/Radio Age that becvause "the scatter market was begging for customers,...slashes in network TV prices" resulted in "spot money being shifted to low CPM network opportunity buys. (December 5, 1983, at 30.)

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[11] Robert Sobel, "Barter Standing Grows in Agency Media Plans," Television/Radio Age, October 10, 1983, at 33.

The station expects that the quality of the nationally distributed program will attract sufficiently greater audiences to permit the sale of local spots at multiples of what might be obtained for programming the station already owns or might produce. However the bulk of the advertising time on bartered programming is sold to national advertisers who wish to reach a substantial fraction of the national audience.[12]

A number of major advertisers have indicated that they will move large amounts of their advertising dollars into barter programming because it offers substantial cost efficiencies when compared with network programming:

> According to most key buying executives from network and barter syndication at ten major agencies, national advertisers' demand for syndicated product is so heavy that virtually every major client is or has recently been a buyer of such programs. . . . Allocations today for ad-supported syndicated programming average ten to fifteen percent of the total network budget and the number of barter shows is said to have increased tenfold since 1972.[13]

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[12] Network Inquiry Special Staff, "An Analysis of the Television Program Production, Acquisition, and Distribution," in New Television Networks: Entry, Jurisdiction, Ownership, and Regulation, Volume II, (FCC, October, 1980), Chapter V.

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[13] Sobel, op. cit., at 33.

This general observation is supported by specific comments from major agency and advertiser executives. Alec Gerster, senior vice president and media director at Grey Advertising recently indicated that "many traditional network scatter buyers balked at this season's high prices and have moved into syndication."[14/] Richard Busciglio, senor vice president and director of broadcast media for McCann-Erickson, echoed Gerster's comments and has recommended to all of his clients that they reserve "between five and ten percent of their advertising budgets for the syndication market." Busciglio noted further that spots are often "25% to 30% cheaper and there a number of programs with clearances comparable to the networks."[15/] And the advertising chief for one of the country's largest national advertisers, Thomas Ryan of Gillette, earlier this year expressed concern with the "spiraling cost of network TV" and indicated that Gillette's annual meeting that they were planning to participate in syndication packages offered by the major Hollywood studios and other production companies.[16/]

[14/] Broadcasting, November 28, 1983, at 25.

[15/] Broadcasting, May 28, 1984, at 39.

[16/] Gay Jervey, "Gillette Diverts Ad Dollars to Syndication," Advertising Age, April 23, 1984, at 81.

Other agency executives support Busciglio's claims of significant savings through barter syndication. Michael Moore senior vice president of Benton and Bowles, for instance, observed that while the average CPM for syndication is about 20% below network, this figure can fall as low as half the network price.[17/]

Most observers see increases in advertising expenditures for syndicated programming coming directly out of expenditures formerly devoted to network advertising:

> Agencies and syndicators maintain that barter money is coming mainly, if not entirely, from network budgets. At Grey Advertising, for instance, Jon Mandel, vice president, associate media director, says "We use syndication as a way of leveraging down network prices. I don't know of a single dime that is coming out of a spot budget." Robert Riesenberg, vice president and associate director of network programming at BBDO, adds: "Our money comes out of network, not spot."[18/]

[17/] Sobel, op. cit., at 64.

[18/] Sanford Josephson, "Barter Growth: Where's the Money Coming From?," Television/Radio Age, December 19, 1983, at 42.

These trends can be illustrated with data on network and national spot advertising expenditures for a few selected brands, as presented in Exhibit 1. The first entry of the table gives data for Kellogg's cereals, an example of a product whose target audience is essentially the entire universe of American households. First of all, it should be noted that even products with broad markets like cereals obviously still rely on a mixture of both network and national spot advertising. In the case of Kellogg's, the overall increase in advertising expenditures between 1982 and 1983 applied about equally to both their network and spot advertising budgets, leaving the distribution of monies between the two markets eseentially unchanged.

The next entry in the exhibit presents comparable data for another cereal, General Mills's Cheerios. If the Justice Department's argument were correct, then one would not expect to see national advertisers significantly alter this distribution of monies between network and national spot advertising. The overall 1983 television budget increased just 1.5% over the previous year, but the distribution of spending between network and national spot changed considerably. In 1982, network advertising represented 61% and national spot represented 39% of the Cheerios' television advertising budget. This distribution was almost completely reversed in 1983: 46% of the budget was devoted to network advertising while 54% went to the national spot market.

Some national advertisers show even more radical reallocations between network and national spot advertising. For example, 30% of the budget for Reynolds' Wrap products in 1982 was devoted to network advertising and 70% to the national spot market. Such significant movements between the two advertising markets, as well as the scale of the commitments to national spot by these national advertisers, indicate that the national spot market is important to national advertisers as a competitive alternative to increasingly expensive network time.

EXHIBIT 1

Network and National Spot Advertising
Expenditures for Selected Major Brands: 1982-83

Brand		Millions of Dollars		
		1982	1983	% Chg.
Kellogg's cereals	Network	$57.4	$ 73.0	+27.1%
	Nat'l Spot	27.3	34.1	+25.0
	Total[*]	$96.5	$116.5	+20.7%
Cheerios cereals	Network	$12.0	$ 9.3	-23.0%
	Nat'l Spot	7.8	10.8	+37.1
	Total	$20.4	$ 20.8	+1.8%
Reynold's Wrap	Network	$ 3.3	$ 0.0	-100.0%
	Nat'l Spot	7.8	21.3	+173.5
	Total	$13.2	$ 23.4	+77.5%
Time magazine	Network	$ 0.6	$ 0.0	-99.6%
	Nat'l Spot	2.3	12.9	+467.3
	Total	$17.3	$ 28.4	+63.8%

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[*] Total advertising expenditures in all media.

Source: *Marketing and Media Decisions*, July 1984, pp. 49ff.

III. Expansion of network ownership of affiliate stations will result in higher prices for local and national advertising.

Because of the relationship between national spot and network advertising prices, lifting the ownership restrictions on the major networks could result in substantial increases in the prices for national spot and network advertising.

These price rises would occur because network purchases of their affiliated stations would immediately result in greater clearances of network programming schedules. The Commission's and the Justice Department's sanguine comments about the effect of network ownership on clearance rates results from a very selective reading of the findings of the Commission's own Network Inquiry Special Staff Report. Both agencies cite the broad finding that "network affiliates. . . clear 97 percent of the networks' prime time schedules and 87 percent of the daytime feed."[19/]

It is important to realize that these figures represent averages across television stations in all markets. A more careful reading of the Network Inquiry Report indicates that stations in larger markets tended to clear a smaller proportion of the network schedule, presumably because these stations have

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[19/] Report and Order, at 35. Also DOJ, at 25, both citing Network Inquiry Special Staff, op. cit., Volume II at 262, (hereafter Network Inquiry).

the financial ability and programming expertise to offer shows with greater local interest. Even more important, however, both agencies ignore the Report's clearly-stated conclusion that "there is a significantly higher clearance rate for network programs on network owned stations than on affiliates."[20/] The Report then goes on to estimate the effect of a network purchasing an affiliate station located in the fifth largest market. Their models predict that network clearance rates on this station would rise from 85% to 97% after network purchase.[21/] A reanalysis of the Staff's findings indicates that this conclusion would hold for stations throughout the top-fifteen markets ranked by size.

These results can be used to estimate the effect such a substantial increase in network clearance rates would have on local advertising inventories. In a typical week, the major networks program some 90 hours during the period 7:00 a.m. to 1:00 a.m. daily. This leaves 36 hours in that time period during which the affiliate station may sell time to local, regional, and national spot advertisers. Using the Network Inquiry Staff's estimate of 85% clearances in major markets,

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[20/] Network Inquiry, Volume II, at 262.

[21/] Id. at 264.

another 13.5 hours of network time would also be sold by the affilate to spot advertisers. Assuming that each hour of programming contains twenty 30-second spot advertisements, these 49.5 hours of local programming translate into a local advertising inventory of 990 spots per week.

After network purchase, according to the Network Inquiry Staff's results, 12% of the 90 network hours will revert to network programming. If the networks sell sixteen of the twenty 30-second spots in each hour of network time, then a total of 0.12 X 90 X 16, or about 173 spots will carry national network advertising and thus become unavailable to spot advertisers. This represents a reduction in local station spot inventories of 173/990, or 17.4% of its spot availabilities.

Such a drastic reduction would almost certainly result in higher prices for local advertising time. In addition, it would result in higher prices for national spots, which would in turn permit the networks to raise network advertising rates without fear of advertisers shifting to national spots.

ATTACHMENT 5

Vertical Integration in Broadcasting:

A Study of Network Owned-and-Operated TV Stations

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Introduction

Since the mid-1950s each U.S. television network has owned five VHF broadcast stations. Network ownership of stations in general and the fact that the network owned-and-operated stations are located in major metropolitan areas has been a source of concern to some students of the mass media.

Critics of TV, concerned with the dominance of network programming and the fewness of networks, argue that this concentration of important sources of information in a few hands is dangerous because it restricts the number of competing viewpoints broadcast to the public and provides an opportunity for opinion molding by well placed individuals. Network ownership of stations is viewed as an extension of network control to what would otherwise be potential sources of non-network programming and opinion. The fact that each network, through its O-and-O's, has a potential audience containing over 20 percent of U.S. households (see Table 1) lends seriousness to the argument against network ownership of stations. However, the argument is weakened somewhat by the fact that independent stations are strongest and most numerous in the television markets containing the O-and-O's.

Although network ownership of stations poses questions of economic interest it has been the subject of little formal economic analysis. Typically network owned stations have been the subject of passing remarks within the context of more general discussions of group ownership or network-affiliate relations.

The fact that the three major networks each own five VHF stations, the maximum permitted by FCC regulations, and that these stations were acquired early in the development of the television industry suggests that station ownership enhances network viability, or at least that it did at the time when networking was still in a developmental stage.

An argument sometimes advanced is that since, in the early years of television, networking services lost money while network-owned stations made substantial profits, network ownership of major market affiliates was initially necessary to subsidize the nascent network services. In addition, ownership of stations in the major markets assured networks of a fairly large minimum potential audience and, since owned stations would not affiliate

Table 1

Network Owned Stations (1977)

	Number of households in ADI[1]	Households in ADI as % of U.S. Total
ABC		
WABC, N. Y.	6,524,300	8.90
WLS, Chicago	2,851,700	3.89
WXYZ, Detroit	1,597,100	2.18
KABC, L. A.	3,806,000	5.19
KGO, San Francisco	1,729,300	2.36
Total	16,508,400	22.52
CBS		
WCBS, N. Y.	6,524,300	8.90
KNXT, L.A.	3,806,000	5.19
WBBM, Chicago	2,851,700	3.89
WCAU, Philadelphia	2,384,100	3.37
KMOX, St. Louis	965,200	1.32
Total	16,531,300	22.67
NBC		
WNBC, N. Y.	6,524,300	8.90
WRC, Washington	1,344,000	1.83
WMAQ, Chicago	2,851,700	3.89
WKYC, Cleveland	1,298,600	1.77
KNBC, L.A.	3,806,000	5.19
Total	15,824,600	21.58

[1] ADI stands for Area of Dominant Influence. An ADI is a television market as defined by ARBITRON.

Souce: Broadcasting Yearbook, 1978

with other networks, this may have been important in determining the identity of the surviving networks.

Today all TV markets with O-and-O's have more than three stations and network affiliation is an asset highly valued by stations. If network owned stations are currently valued more highly by the networks than they would be by independent owners with similar network affiliation, then this enhanced valuation must be due to factors other than those cited in the preceding paragraph.

In this context it is sometimes suggested that control over the national spot sales of the O-and-O's increases the market power of the networks in the market for national television advertising, a market in which the networks are already dominant. Table 2 lists the contribution of O-and-O spot sales to the total advertising revenues of the networks (O-and-O spot plus network advertising) for the years 1965-1977. Network controlled advertising has been a remarkably constant percentage of total national TV advertising, falling between 68 and 69 percent in all but four of the years reported. O-and-O spot sales as a percentage of total national TV advertising sales have ranged from a high of 10.6 percent to a low of 6.7 percent. This percentage seems to be gradually declining. That O-and-O spot sales may account for as much as 17 percent of network controlled national advertising suggests that the contribution of O-and-O spot sales to network domination of the market for national television advertising deserves additional study.

In this paper two other issues relating to network owned stations will be explored. In the next section of this paper it will be argued that network owned stations have an incentive to price spot advertising time differently than unowned affiliates. A test of this hypothesis is reported in section 4. The analysis of section 3 suggests that network ownership of major affiliates may affect the outcome of bargaining between networks and their unowned affiliates, and that the existence of O-and-O's may be a factor in determining the revenues earned by suppliers of television programs.

A formal analysis of both issues is provided in the appendix.

2. The price of spot advertising time on network-owned-and-operated stations.

The primary assumption upon which the analysis of this section and the rest of this paper is predicated is that both networks and stations are profit maximizers, and that in maximizing their profits stations not owned by networks take network behavior as given while networks also take the behavior of their unowned affiliates as given. That is, it is assumed that stations and networks do not collude to maximize their joint profits unless the stations are network owned. Throughout this discussion

Table 2

Gross National TV Advertising

Year	Total National TV Advertising ($ million)	Network Advertising ($ million)	Total National Spot ($ million)	National spot on O&O's ($ million)	Network Sales As % of total	O&O Spot Sales % of total	Combined Network and O&O Sales % of total
1977	$5,208.5	$3,241.2	$1,967.3	$348.4	62.2	6.7	68.9
1976	4,597.5	2,674.9	1,922.6	375.5	58.2	8.2	66.4
1975	3,605.9	2,156.7	1,449.2	290.7	60.0	8.0	68.0
1974	3,341.7	2,005.6	1,336.1	286.4	60.0	8.6	68.6
1973	3,069.9	1,839.7	1,230.2	273.4	60.0	8.9	68.9
1972	2,864.9	1,687.5	1,177.4	272.7	58.9	9.5	68.4
1971	2,493.2	1,490.4	1,002.8	236.4	59.8	9.5	69.3
1970	2,653.9	1,551.1	1,102.6	270.2	58.4	10.2	68.6
1969	2,688.7	1,569.6	1,119.1	279.5	58.4	10.4	68.8
1968	2,434.1	1,424.3	1,009.8	257.1	58.5	10.6	69.1
1967	2,241.8	1,359.1	882.7	NA	60.6	NA	NA
1966	2,184.6	1,302.4	882.2	230.9	59.6	10.6	70.2
1965	1,937.6	1,141.7	795.9	179.5	58.9	9.3	68.2

Source: FCC data reported in annual issues of Broadcasting.

the existence of time periods in which the broadcast of network programs is prohibited by FCC regulation is ignored.

Station profits are just station revenue minus station costs. Station costs are the costs associated with the ownership and maintenance of the station's broadcast facilities, the salaries of station personnel, and payments for programs acquired from non-network sources, including programs produced by the station itself. For network affiliates there are two principal sources of revenue. On most programs broadcast by a station, time is reserved for commercial announcements. The station may sell a portion of this commercial time to local, regional and national advertisers. In addition the station receives payment from its network for broadcasting, or clearing, programs supplied by the network.

For the station there are both benefits and costs associated with the clearance of network programs. Network programs generally attract much larger audiences than non-network substitutes. Since advertisers are buying audience exposure, advertising time can generally be sold at a much higher price on network programs. In addition the station receives network clearance payments. However, the proportion of broadcasting time which may be devoted to commercial messages is strictly limited by the Television Code of the National Association of Broadcasters, and when network programs are broadcast a major portion of this commercial time is claimed by the network for the broadcast of network advertising. Thus, while the value of commercial time sold by the station is enhanced by network programming, there is less of it available to be sold.

In choosing among network and non-network programs a station attempts to find the most profitable combination of network and non-network offerings. Since clearance payments are based on the time period in which network programs are broadcast and not on program popularity, for stations the attractiveness of network programs relative to non-network alternatives declines with the audience appeal of the network program. For the most popular network shows there is no serious non-network competition. But for shows with less audience appeal non-network programs may be preferred. If network programs are listed in order of descending audience appeal, an affiliated station may be visualized as proceeding through the list, starting with the most popular, accepting network programs until a program is encountered which is less attractive than non-network alternatives. Remaining slots in the station's broadcast schedule would then be filled with programs from non-network sources.

The major source of network revenue is commercial time on network programs which is sold to national advertisers. Network advertising time purchased on a particular program provides the advertiser with exposure on all stations clearing the program. As was the case with commercial time sold by stations, the value of network commercial time increases with the size of the audience to which it is broadcast. Thus a network can increase its revenue by increasing the audience appeal of its programs and by increasing the number of its affiliates that broadcast them. As long as its affiliates find it profitable to broadcast some non-network programming, a network's profit objectives must be incompatible with the objectives of its affiliates.

The conflict between network and affiliate objectives does not exist for network owned stations since individual objectives are supplanted by the goal of joint profit maximization. If non-network programs and marginal network programs are close substitutes financially from the station's point of view, a network owned station will always clear the network programs since this increases the value of network commercial time sold on those programs. For this reason one would expect network owned stations to clear more network programs than unowned affiliates. The substitution of network for non-network programs involves a concomitant increase in network commercials broadcast by the station and a reduction in the amount of advertising time the station can sell. This reduction in station sold time should be reflected in a higher price for locally sold spot announcement time on network owned stations than on unowned affiliates. The higher price would be needed to clear the local spot market, given that the network owned affiliate would, as a matter of business strategy, want to clear a higher proportion of network programming. An empirical test which supported the hypothesis that network owned stations charge higher prices for station time is reported in section 4 of this paper.

3. The effect of O-and-O's on the income of unowned affiliates and the price of television programs.

The ability of networks to control the programming decisions of their owned afffiliates alters the economic environment for the suppliers of television programming.

For the owner of a program already in a network's lineup an alternative to selling the program to the network would be to sell it on a syndicated basis to the same stations individually. Therefore, to retain its programs a network must pay program owners a price high enough to make selling to the network more renumerative than the alternative of syndication. By refusing to air syndicated programs on its owned stations a network could reduce the revenue available in syndication and thereby reduce the prices the network pays for network programs.

This argument may be made clearer if the introduction of some notation is permitted.

Assume the owner of a program currently offered by a network to its affiliates is considering the possibility of selling the program on a syndicated basis instead. Let RN be the advertising revenue a station could earn from the sale of advertising on the program with which the network would replace the program being considered for syndication. Let RS be the advertising revenue a station would earn if it could buy the current network program on a syndicated basis. Let d be the rate paid by the network for clearance and let P be the price to stations of the program in syndication. A station will buy the program on a syndicated basis if the potential advertising revenue from the sale of time on the program minus the program's price exceeds the revenue attainable from the sale of commercial time on the program's network replacement plus the network clearance rate. In terms of the notation just introduced, a station will buy the program in syndication if

$$RS - P > RN + d.$$

Thus, the highest price the program can command in syndication is given by

$$P = RS - RN - d. \tag{1}$$

At a higher price stations will clear the network program.

If the program is aired on m similar network affiliates the program could earn mP in syndication.

To retain the program the network must pay the program's owner at least mP. However, if the network refuses to broadcast the program on a syndicated basis on its five O-and-O's, the value of the program in syndication is reduced to (m-5)P. Since m is approximately equal to 200 for each of the national networks, at first glance the reduction in syndication earnings caused by the inaccessibility of the O-and-O markets appears to be negligible, on the order of 2 1/2 percent. This understates the true effect. The O-and-O markets contain in excess of 20% of U.S. TV households, so the denial of network owned stations to syndicated programs could conceivably result in a reduction in syndication earnings of as much as 20 percent. The true effect must fall within these two extremes.

(m-5)P, properly interpreted, should be considered a lower bound. The existence of independent stations which may also buy the program in the O-and-O markets should increase the program's potential syndication revenues somewhat. However, if, as is widely believed, the size of a program's audience on a given station is in part determined by the popularity of the other programs broadcast by the station, a network quality program would suffer from the association with the weaker programs generally broadcast by independents. Thus, by denying a program access to its O-and-O's a network may reduce its value in syndication and as a consequence reduce the price at which it can be acquired by the network.

In reality a program owner would be willing to sell his program to the network for less than its potential revenue in syndication. This is because the program owner incurs distribution costs in syndication which are an increasing function of program revenue and which are not a factor in network broadcasting.

The differential created by distribution costs between network payments for a program and its potential syndication revenue may make it profitable for a network to increase its payments to program owners somewhat. An increase in the price paid by the network for programs will be reflected in a more than proportionate increase in the price program owners would demand for selling their programs on a syndicated basis. If a network program's asking price in syndication is increased the network can reduce the clearance rate by an equivalent amount without forcing the program into the syndication market. This is revealed by equation (1). Thus, by increasing its payments to program suppliers the network may achieve a more than commensurate reduction in clearance payments to affiliates.

The limit beyond which clearance rates cannot be reduced is determined by the quality of programs already available on the syndication market. If d, the rate paid by networks for clearance, is set too low stations will purchase these programs.

The effect of network owned stations on the earnings of syndicated programs is similar to its effect on the earnings of network programs. If denied access to the O-and-O's, the earnings of syndicated programs would be lower than they might have been otherwise. If the reduced earnings resulted in a diminution in the flow of talent into the syndication market, syndicated programs would become less attractive to stations relative to network programs. This would enable networks to set their clearance rates lower than would have been possible otherwise.

4. An Empirical Test

In section 2 it was suggested that network-owned stations may sell spot advertising time at a higher price than unowned affiliates similarly located. This section reports on a regression analysis intended as a partial test of that hypothesis.

The equations reported are reduced form. For each equation the dependent variable is the station's highest 30 sec. spot rate for a single insertion as reported in (6). The independent variables along with other variables from which some of them were constructed are listed and described below

Variable	Description
UHF	A dummy variable with value of 1 if station is UHF, O if VHF.
ABC	A dummy with value of 1 if station is an ABC affiliate.
CBS	A dummy with value of 1 for CBS affiliates.
NO	A dummy with value of 1 if station is network owned.
M3V	A dummy with value of 1 if there are more than three VHF stations in the station's ADI.
M3S	A dummy with value of 1 if there are more tnen three stations in the station's ADI.
BIG3	A dummy with value of 1 if station is located in New York, Chicago, or Los Angeles. In each of these cities all affiliated stations are network owned.
HH	The number of households (OO) within the station's ADI.
CNO	A dummy with value of 1 if the station competes ~~with~~ an O-and-O in the same ADI.
TVHH	The number of households (00) owning TV sets in the station's ADI.
CSI	Total consumer spendable income ($000,000) in the stations ADI. Spendable income is income remaining to persons after all payments to the federal and state governments are deducted.
AHSI	CSI/HH
INT	Intercept.

ADI stands for Area of Dominant Influence and represents an attempt by ARBITRON to define geographical television markets.

The data set for the variables listed was obtained from (3) and (6).

Each equation reported in tables 3 and 4 was estimated with various combinations of linear and nonlinear forms of the data for the 30 sec. spot rate, TVHH, and AHSI. A reflection of uncertainty about the underlying structural relation. Regressions with all three variables in linear form consistently provided the best fit, as measured by R^2, for all specifications of the model. However, the results were generally robust across all specifications.

The sample for equations 1-3 consists of the network affiliates in the 35 largest television markets as listed in (3). Each market had three network affiliates for a total of 105, but one station in Chicago and one station in Sacramento were dropped from the sample because of ambiguity in their published rate cards. So the final sample size was 103.

For equations 4 and 5 all stations from Chicago, New York, and Los Angeles were dropped from the sample for equations 1-3, leaving a total of 95 observations.

Equation 1 is identical to equation 2 with the exception that M3V in equation 1 has been replaced by M3S in equation 2. M3V and M3S were included in the equations to provide a measure of the effect of competition from independent stations on the price of spot time sold by affiliated stations. It was hoped that the difference in the coefficients of the two dummies would reflect the difference in the competitive effect of independent UHF and independent VHF stations.

The analysis of section 2 suggests that network owned stations would desire a spot price above what is deemed optimal by unowned affiliates. If this is the case, competition from unowned affiliates may force O-and-O's to reduce their spot rates somewhat. Thus O-and-O prices should be highest in markets where all network affiliates are network-owned. Also, if networks are able to collude on prices, such collusion should be reflected in the pricing policies of the network owned stations in all O-and-O markets. Either of these factors, if operative, should be reflected in higher O-and-O spot rates in Chicago, Los Angeles, and New York, the markets in which each network owns a station. To allow for this possibility the dummy BIG3 was entered in equations 1 and 2. To provide a benchmark equation 1 was run without BIG3 as equation 3.

To further guard against irregularities introduced by the all O-and-O markets, the Chicago, Los Angeles, and New York stations were dropped from the sample and the equivalents of equations 1 and 2, identified as equations 4 and 5 respectively, were estimated again. The similarity of the coefficients on all variables across all five equations reveals that the inclusion

Table 3

Vari-able	Equation 1 $R^2 = .97$ coef	Equation 1 $R^2 = .97$ t-stat	Equation 2 $R^2 = .97$ coef	Equation 2 $R^2 = .97$ t-stat	Equation 3 $R^2 = .97$ coef	Equation 3 $R^2 = .97$ t-stat
INT	-624.97	-3.52	-688.08	-3.80	-630.69	-3.44
UHF	-317.21	-2.72	-351.37	-2.99	-303.01	-2.52
ABC	-29.29	-0.62	-30.27	-0.63	-29.14	-0.60
CBS	-50.54	-1.06	-51.49	-1.07	-56.75	-1.15
NO	328.25	3.58	338.69	3.66	381.90	4.14
M3V	79.77	1.79	-	-	88.03	1.92
M3S	-	-	58.21	0.92	-	-
BIG3	417.47	2.67	437.65	2.77	-	-
CNO	88.67	1.23	99.11	1.36	33.06	0.46
TVHH	0.08	20.05	0.08	19.86	0.09	31.19
AHSI	809.67	4.45	850.21	4.66	762.95	4.08

Table 4

Variable	Equation 4 $R^2 = .97$ coef	Equation 4 $R^2 = .97$ t-stat	Equation 5 $R^2 = .97$ coef	Equation 5 $R^2 = .97$ t-stat
INT	-674.24	-3.53	-727.80	-3.69
UHF	-299.80	-2.52	-343.77	-2.82
ABC	-17.59	-0.35	-17.34	-0.34
CBS	-49.98	-0.98	-52.34	-1.00
NO	413.67	4.25	432.08	4.33
M3V	113.20	2.42	-	-
M3S	-	-	60.11	0.91
CNO	79.53	1.06	88.04	1.14
TVHH	0.09	29.60	0.09	29.40
AHSI	806.59	4.18	841.32	4.22

of the stations from the 11 O-and-O markets in the sample had little effect on the estimated relationship. However, the coefficients of BIG3 in equations 1 and 2 were both positive, as predicted, and significant at the five percent level, where significance is measured by a one-tailed t-test. Whether this indicates a difference in pricing policy on the part of O-and-O's in the three largest markets or just reflects nonlinearity in the true relationship is unclear and cannot be determined without further study.

With one exception, the estimated coefficients of the remaining independent variables were of the sign anticipated and, for the variables of most theoretical interest, were highly significant. Significance levels, where reported below, were determined by a one-tailed t-test.

The coefficient of UHF, reflecting the inferiority of UHF to VHF signals, is negative and significant at the five percent level for all equations.

The coefficients of TVHH and AHSI are positive and significant at well beyond the one percent level for all equations. This is not surprising. One would expect advertisers to be willing to pay a higher price for advertising time in markets with more potential customers and in markets where households have larger buying power.

Within a given market a major determinant of the size of a station's audience, and thus its advertising price, is the quality of its programs. To allow for differences in program quality, dummies for ABC and CBS were included in the equations. Without exception the estimated coefficients of these dummies are negative but insignificant.

Of most interest is the coefficient of NO since its sign is the subject of the analysis of section 2 of this paper. The regression results strongly support our hypothesis that O-and-O's set higher advertising rates than unowned affiliates. In all five regressions the estimated coefficient is positive and significant at the one percent level.[1]

If O-and-O's set higher prices than other affiliates, one would expect the stations with which they are competing to raise their prices also. The positive coefficients of CNO support this hypothesis but are not significant by usual standards.

Only for M3V and M3S was the sign of the estimated coefficient contrary to prior expectation. It was expected that in markets with more than three stations, the competition from independent stations would cause network affiliates to reduce their advertising prices. Exactly the opposite is observed. The coefficients of M3V and M3S are always positive in the equations in which they appear.

It appears we have unwittingly provided support for a hypothesis we had no intention of testing. In markets with four or more stations networks have a choice of affiliates. It is sometimes argued that in such markets affiliates are more sensitive to network demands since they face a credible threat of disaffiliation if they incur network displeasure.[2] It was argued in section 2 that it is in a network's interest to encourage its affiliates to broadcast more network programming than is optimal from the stations' points of view. In other words, a network wants its affiliates to behave like O-and-O's. The positive coefficients of M3V and M3S suggest that this objective is at least partially met in markets with more than three stations. The fact that the coefficients of M3V are larger and more significant than the coefficients of M3S provides additional support for the credible threat hypothesis. One would expect the threat of disaffiliation to be most credible in markets where one or more of the independents are VHF stations. The coefficient of M3V is significant at the ten percent level in equations 1 and 3 and significant at the five percent level in equation 4.

Discussion of Data

The results of the empirical study reported in this section strongly support the spot rate hypothesis of section 2. However, assessment of the significance of the study is only possible if one is aware of the limitations of the data employed.

The most serious data related problems involved defining the product and defining the relevant market. Television commercial time is clearly not a homogenous product. Announcement time is sold in varying lengths for different times of the day and for different dates on the calendar. An advertiser can purchase a single insertion or varying schedules of multiple insertions. Finally, commercial time is rarely sold at the price published on station rate cards. Sale prices are flexible and vary with fluctuations in demand.[3] Yet, for an empirical study it is necessary to select a representative price. The validity of the empirical results reported are contingent on the assumption that changes in published rates accurately reflect changes in the relevant prices at which television time is traded. Since, presumably, station rate cards are published to serve advertisers as a basis for at least preliminary purchase decisions, we felt this assumption was a reasonable one.

Since it is invariably a prime time rate, the choice of the highest 30 second spot rate as the representative price is important because stations clear a higher proportion of network programming during prime time than during the rest of the broadcast day. Thus it is during prime time that the behavior of unowned affiliates most closely approximates that of O-and-O's and it is in the price of prime time commercial time that the predicted price differential is least likely to be observed. This strengthens the significance of the empirical results reported. One would expect to get the same results, only magnified, if the test were performed on prices for other time periods.

The choice of an empirical definition for station markets also presented difficulties and the definition chosen is necessarily imperfect. A television station simultaneously competes with other local stations and with the national networks, including its own. In addition stations compete with newspapers, magazines, radio and other media for advertising business. No empirical measure can adequately reflect the extent of this competition. The ADI, the measure employed in this study, reflects factors of importance in local competition among stations. It was designed for this purpose and is recommended by the fact that it is one datum provided by a well established commercial service with numerous subscribers.

5. Conclusions

In this paper it has been argued that the existence of network owned-and-operated stations has economic consequences beyond those that can be attributed to station groups in general.

An hypothesis has been advanced that network owned stations would, as a matter of profit maximizing behavior, broadcast more network programming than would unowned affiliates. It was not possible to test this hypothesis directly, but an indirect test was feasible. The logic of the indirect test flowed from the fact that onwed and unowned affiliates would necessarily reach different pricing decisions. An empirical test of the derived hypothesis found support for the theory.

As far as the implications for viewer welfare are concerned, an argument could be made that the vertical integration of the network O-and-O's provides viewer preferred programming. It also follows from the theory that the demand for syndicated programs is reduced due to the existence of the O-and-O's.

On the basis of this and additional analysis it was argued that the existence of O-and-O's may enable the networks to effect a reduction in their payments to the suppliers of network programs and to reduce their clearance payments to affiliated stations. In both cases it is impossible to guess at the magnitude of the effect, assuming there is one, on the basis of currently available evidence. At any rate, the effect of O-and-O's on unowned affiliates should not be a source of great concern since the profit rates of most affiliates already far exceed the average in most other industries.

This paper should be viewed as exploratory and as a first attempt to identify and investigate some of the problems relating to network owned stations. Without support from additional investigation, the conclusions of this study should not be considered sufficiently well established to serve as the basis for policy forumlation.

APPENDIX

In the main text of this paper the hypothesis was advanced that network owned television stations may set a higher price for spot advertising time than unowned affiliatates of the same network. It was also argued that because the networks own some of their major affiliates the returns to both the unowned affiliates and the suppliers of television programs may be less than they would otherwise be. This appendix provides a formal analysis of these issues.

The model to be developed looks at the determinants of an affiliate's choice between network and non-network programs. As an alternative to programs supplied by its network a station may produce its own programs or purchase programs from suppliers of syndicated material. For this analysis the distinction between station originated programs and syndicated programs is ignored. All non-network programs are assumed to be syndicated.

In the model it is assumed that all choice variables are continuously variable although in reality some of them can only be changed by discrete amounts. While some realism is sacrificed for the sake of analytical convenience, the qualitative nature of the results is unaffected.

We will make use of the following definitions:

$A^s{}_i$, $A^n{}_i$ = the total number of commercial minutes sold by affiliated station i on all syndicated and network programs respectively. In the following analysis the subscripts on these variables will be suppressed where no ambiguity results.

m = the number of network affiliates.

S_i = the number of daily hours of syndicated programming purchased by station i.

N_i = the number of daily hours of network programming utilized by station i.

T_i = the length of the programming day in hours. Obviously $T_i = S_i + N_i$.

$N = (N_1, N_2, \ldots, N_m)$ is a vector giving the number of hours of network programming accepted by each of a network's affiliates.

$$\frac{\partial R_i}{\partial A_i^s}, \frac{\partial R_i}{\partial A_i^n} > 0 , \quad \frac{\partial^2 R_i}{\partial (A_i^s)^2}, \frac{\partial^2 R_i}{\partial (A_i^n)^2} < 0 \ .$$

$R_n = R_n(N)$ is network revenues derived from the sale of network commercial time on network programs.

$\frac{\partial R_n}{\partial N_i} > 0$ since the value of network commercials on a program increases with the number of stations showing the program.

$\frac{\partial^2 R_n}{\partial N_i^2} \leq 0$ since network programs are accepted by stations in order of their audience appeal.

d_i = the compensation per hour or clearance rate, paid to station i by its network for clearing network programs.

$\frac{\partial d_i}{\partial N_i} > 0$ since as N_i increases network programs of decreasing audience appeal must displace increasingly profitable syndicated programs.

K = the total cost to the network of its program offerings.

Π_n, Π_i = the profits of the network and station i respectively.

Note that since the number of hours in the programming day is limited, if a station increases its use of syndicated programs it does so at the expense of network programming and vice versa. Since the station can sell more commercial time on syndicated than network programs, the

Note that since the number of hours in the programming day is limited, if a station increases its use of syndicated programs it does so at the expense of network programming and vice versa. Since the station can sell more commercial time on syndicated than network programs, the total amount of commercial time sold by the station is determined by its programming mix.

Station i's profits are given by

$$\Pi_i = R_i\ (A^s{}_i, A^n{}_i) + d_i N_i - C_i\ (S_i)\ . \tag{1}$$

Since S_i in $C_i\ (S_i)$ may be replaced by $T_i - N_i$ and $A^s{}_i = aS_i = a(T_i - N_i)$ and $A^n{}_i = bN_i$, Π_i is a function for which N_i is the only choice variable. T_i is a constraint on the number of hours of network programming that may be broadcast by the station so the maximization of station profits may be treated as a nonlinear programming problem.

The station maximizes Π_i with respect to N_i subject to the constraint that

$$T_i - N_i \geq 0$$

Letting λ_i be the Lagrange multiplier, the Kuhn-Tucker conditions for a maximum are

$$\text{(2.a)}\quad \frac{\partial R_i}{\partial A^n{}_i} b - \frac{\partial R_i}{\partial A^s{}_i} a + d_i + c_i - \lambda_i \leq 0, \qquad \text{(2.b)}\quad N_i \geq 0\ ,$$

$$\text{(2.c)}\quad N_i\ \left(\frac{\partial R_i}{\partial A^n{}_i} b - \frac{\partial R_i}{\partial A^s{}_i} a + d_i + c_i - \lambda_i\right) = 0\ , \text{ and}$$

$$\text{(3.a)}\quad T_i - N_i \geq 0\ , \qquad \text{(3.b)}\quad \lambda_i \geq 0\ , \qquad \text{(3.c)}\quad \overline{\lambda_i}\,(T_i - N_i) = 0.$$

We can assume that the inequality holds in (2.b); otherwise we must explain the existence of a network affiliate that does not broadcast network programs. N_i positive, in conjunction with the complimentary slack condition, (2.c), tells us that the equality must be satisfied in (2.a).

If λ_i is positive we know by condition (3.c) that $N_i = T_i$. λ_i represents the station's valuation of a marginal unit of programming. So λ_i positive means that the station would be willing to accept a reduction in its clearance rate before it would voluntarily give up the $T^{th}/_i$ unit of network programming. Thus, as long as λ_i is positive the network cannot be maximizing its profits since it could reduce d_i without affecting N_i. Assuming the network maximizes profits we can set $\lambda_i = 0$. The constraint is not binding although it may be satisfied as an equality. $\lambda_i = 0$ means that (2.a) has the form of a first order condition for an unconstrained maximum and we can work with (2').

(2') $$\frac{\partial R_i}{\partial A^n{}_i} b - \frac{\partial R_i}{\partial A^s{}_i} a + d_i + c_i = 0$$

The network tries to maximize

(4) $$\Pi_n = R_n(N) - \sum_{i=1}^{m} d_i N_i - K$$

with respect to N subject to

$$T_i - N_i \geq 0, \; i = 1,2,\ldots,m \; .$$

Since the constraints faced by the network are exactly those faced by its affiliates individually, we already know that at the network optimum the constraints are not binding, although again they may be just satisfied as equalities, so that the first derivative of network profits with respect to each of the N_i also has the appearance of the first order condition for an unconstrained maximum.

(5) $$\frac{\partial R_n}{\partial N_i} - d_i - \frac{\partial d_i}{\partial N_i} N_i = 0, \text{ all } i \; .$$

Solving (2') for d_i and substituting into (5) yields

(6) $$\frac{\partial R_n}{\partial N_i} + \frac{\partial R_i}{\partial A^n{}_i} b - \frac{\partial R_i}{\partial A^s{}_i} a + c_i = \frac{\partial d_i}{\partial N_i} N_i \; .$$

If the network buys station j network profits will be given by

(7) $$R_n + R_j - \sum_{i \neq j} d_i N_i - C_j\,(T_j - N_j) - K \; .$$

Maximizing with respect to N_j gives

(8) $$\frac{\partial R_n}{\partial N_j} + \frac{\partial R_j}{\partial A^n{}_j} b - \frac{\partial R_j}{\partial A^s{}_j} a + c_j = 0$$

if the constraint is not binding at the optimum. (8) differs from (6) by $\frac{\partial d_i}{\partial N_i} N_i$ which is positive, which means that a network owned station will air more network programming than a non-owned affiliate. The result is the same if the constraint is binding since then station j will broadcast only network programs. The substitution of network for syndicated programs reduces the amount of commercial time available to the station to sell on the spot market so the price of spot announcements sold by network owned stations should be higher than the price charged by non-owned stations similarly located.

A slight extension of the model enables us to address the second question about the effect of network owned stations on the division of revenues between networks, affiliates, and program suppliers.

While it does not affect the nature of our conclusions it is convenient to assume that all network affiliates are identical. Therefore i and j subscripts will be suppressed in the following analysis and R will stand for the revenue of a representative affiliated station.

Consider any program currently in the network's lineup. The owner of the program could withdraw the program from the network and sell it to the affiliated stations on a syndicated basis if

$$\frac{\partial R}{\partial A^n}(a - b) - P \geq d\ ,$$

where P is price at which the program is sold to individual affiliates.[1] Stated differently

$$P = \frac{\partial R}{\partial A^n}(a - b) - d \tag{9}$$

is the highest price the program owner can charge in syndication.

If the program is broadcast over all m affiliates, gross revenue from syndication would be mP. If program distributors receive a fixed share, δ, of gross revenues, the net revenue realized by the owners of the program would be $m(1 - \delta)P$. Let k represent total payments made by the network to the owners of the program. If the network wants to retain the program it must pay the program's owners a minimum of

$$k = m(1 - \delta)P\ . \tag{10}$$

Let $m' < m$ be the number of affiliated stations not owned by the network. It was shown above that network owned stations will buy less syndicated programming than non-owned affiliates. Equation (10) tells us that a network has an additional reason for favoring network programs on its own stations. If a program owner knows he cannot sell his program to network owned stations, m' can be substituted for m in (10) which reduces the price the program can command from the network. This conclusion is weakened somewhat by the existence of independent stations in markets where networks own stations. However, if the widely held belief that a program's popularity is in part determined by the attractiveness of other programs, especially the programs immediately preceding and following it, in a station's schedule is true, then the audience share of a network quality program broadcast on an independent station would be below the share it would attract if it were included in the program lineup of a network affiliate, so syndication revenues would still be reduced.

Substituting the value for P given by equation (9) into equation (10) and rearranging yields

(11) $$d = \frac{\partial R}{\partial A^n}(a - b) - \frac{K}{(1-\delta)m} .$$

(11) tells us that d and k cannot be determined independently by the network, a relationship first discovered by Noll, Peck and McGowan (4, appendix B).

If the program under consideration was the only one offered by the network, equation (4) could be rewritten as

(4') $$\Pi_n = R_n - md - k .$$

Substituting (11) into (4') and taking the first derivative of Π_n with respect to k yields

(12) $$\frac{\partial \Pi_n}{\partial k} = \frac{1}{1-\delta} - 1 .$$

(12) is positive so the network will increase K and reduce d as much as is feasible. The minimum value of d is determined by the attractiveness of syndicated programs available to stations, since for d low enough stations will substitute syndicated for network programming. If a network could set the clearance rate independently for each network program, clearance rates would vary inversely with program popularity. Since in actuality the same clearance rate is applied to most programs within a given time period, the network will set the rate just high enough to keep its affiliates from replacing its weakest program with a syndicated alternative.

The effect of network station ownership on the earnings of syndicated programs is similar to its effect on the earnings of network programs which was analyzed above. If owners of syndicated programs cannot sell to network owned stations, either prices must be higher in sales to non-network stations or revenue earned in syndication must be lower than it would have been otherwise. If revenues are lower, fewer resources will be attracted to the syndication market and program quality will be lower than it could have been if there were no network owned stations. In either case the attractiveness of syndicated programs relative to network fare is reduced from a station's point of view. This enables a network to set the clearance rate lower than what would have been possible otherwise.

FOOTNOTE TO APPENDIX

1. The above equation implicitly assumes that the network can replace the withdrawn program with another program of comparable quality. This is probably not generally the case. Replacement programs will usually be inferior to those withdrawn, so the equation understates the price that a network program could command in syndication. This simplifying assumption does not affect our analytical conclusions and the expression used has the advantage of revealing more clearly the factors influencing the purchase decision of the station, especially the increase in commercial time sold by the station if a syndicated program is bought.

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[1] The initial reaction to these results was that they were incompatible with results reported by Owen (5, p. 97). In a similar study, using 1967 data, Owen recorded negative and significant coefficients for O-and-O dummies. The apparent conflict is the result of different choices for dependent variables, and one important independent variable, market size. This study used the highest 30 sec. spot rate while the Owen study used the highest prime time hourly rate of the station as the dependent variable. The hourly rate is the price a sponsor pays a station to reserve an hour of broadcast time for a program provided by the sponsor. Programs with an identifiable sponsor no longer account for a significant portion of television programming, so we feel the 30 sec. rate is a more realistic choice.

A negative coefficient for the O-and-O dummy was predicted in section 2 because stations must sacrifice some of their advertising time when they clear network programs. The fact that there is no commercial time to allocate between network and station when the sponsor provides the program may account for the difference in the findings of the two studies.

[2] For example, see Besen and Soligo (1).

[3] Blank (2).

REFERENCES

1. Besen, S.M. and Soligo, R., "The Economics of the Network-Affiliate Relationship in the Television Broadcasting Industry," American Economic Review, June 1973, 63, 259-68.

2. Blank, D.M., "Television Advertising: The Great Discount Illusion, or Tonypandy Revisited," Journal of Business, January 1968, 41, 10-38.

3. Broadcasting, 1972 Yearbook.

4. Noll, R.G., Peck, M.J. and McGowan, J.J., Economic Aspects of Television Regulation, The Brookings Institution, Washington, 1973.

5. Owen, B.M., "The Price Effects of Mergers," Studies in Industry Economics, Stanford University, April 1970.

6. Standard Rate and Data Service, Spot Television Rates and Data, November 15, 1971, 53.

ATTACHMENT 6

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FILED

JUL 21 1976

CLERK, U. S. DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
BY
DEPUTY

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,
Plaintiff,
v.
AMERICAN BROADCASTING COMPANIES, INC.,
Defendant.

Civil No. 74-3600-RJK

STIPULATION OF FACTS

IT IS HEREBY STIPULATED AND AGREED by and between the parties through their respective counsel that Plaintiff's Request for Second Phase Production of Documents Under Rule 34, served February 13, 1976, is withdrawn; and in lieu thereof, the facts set forth below shall be deemed to be true for the purpose of this action only, and not subject to contradiction or contest.

IT IS FURTHER STIPULATED AND AGREED, however, that the parties do not waive or relinquish any objection to the introduction in evidence at the trial of this action of any of the facts stipulated herein on the basis of relevance or materiality.

1. During the period covered by the Complaint, defendant American Broadcasting Companies, Inc. ("ABC") has become quickly apprised of the prices, terms and conditions offered by CBS Inc. ("CBS") and/or National Broadcasting Company, Inc. ("NBC") to outside program suppliers for first-run rights of exhibition

and other rights and interests relating to prime time television entertainment programs. 1/

2. During the period covered by the Complaint, defendant ABC has quickly become apprised of the prices, terms and provisions in the contracts pursuant to which CBS and/or NBC have acquired first-run rights of exhibition, including those by which rights and interests relating to prime time television entertainment programs were acquired.

3. During the period covered by the Complaint and based on, inter alia, the information concerning CBS and/or NBC described in paragraphs 1 and 2 above, defendant ABC has offered substantially the same prices, terms and conditions as CBS and NBC to outside program suppliers for first-run rights of exhibition and other rights and interests relating to comparable prime time television entertainment programs.

4. During the period covered by the Complaint and based on, inter alia, the information concerning CBS and/or NBC described in paragraphs 1 and 2 above, defendant ABC has entered into contracts with outside program suppliers for first-run rights of exhibition and other rights and interests relating to comparable prime time television entertainment programs which contain substantially the same prices, terms and provisions as those of CBS and NBC with respect to:

1/ As used herein such rights and interests include:

domestic syndication distribution right
domestic syndication profit share
foreign syndication distribution right
foreign syndication profit share
merchandising right
merchandising profit share
music right
music profit share
literary right
literary profit share

term of years
exclusivity
pilot price
license fees
creative control
syndication right
syndication profit share
domestic syndication distribution right
domestic syndication profit share
foreign syndication distribution right
foreign syndication profit share
merchandising right
merchandising profit share
music right
music profit share
literary right
literary profit share

5. During the period covered by the Complaint, defendant ABC has quickly become apprised of those prime time television entertainment programs which CBS and/or NBC plan to produce.

6. During the period covered by the Complaint, defendant ABC has acted upon the information described in paragraph 5 above.

7. During the period covered by the Complaint, defendant ABC has quickly become apprised of the plans and activities of CBS and/or NBC concerning production and/or distribution of theatrical feature films.

8. During the period covered by the Complaint and based on, inter alia, the information concerning CBS and/or NBC described in paragraph 7 above, defendant ABC produced and caused to be distributed theatrical feature films in a manner substantially similar to CBS.

9. During the period covered by the Complaint, defendant ABC has been quickly apprised of the conditions offered by CBS and/or NBC to outside program suppliers for the use of CBS's and/or NBC's respective studio facilities.

10. During the period covered by the Complaint and based on, inter alia, the information concerning CBS and/or NBC described in paragraph 9 above, defendant ABC has offered substantially the same conditions to outside program suppliers as CBS and/or NBC for the use of ABC's studio facilities.

Dated: July 15, 1976

Attorney, Department of Justice

BERGSON, BORKLAND, MARGOLIS &
ADLER and LILLICK, McHOSE &
CHARLES

By James R.

Attorneys for Defendant
American Broadcasting
Companies, Inc.

ORDER

IT IS SO ORDERED THIS 21st day of July, 1976.

UNITED STATES DISTRICT JUDGE

ATTACHMENT 7

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,)
Plaintiff,)
v.) Civil No. 74-3599-RJK
CBS INC.,)
Defendant.)

UNITED STATES OF AMERICA,)
Plaintiff,)
v.) Civil No. 74-3600-RJK
AMERICAN BROADCASTING COMPANIES, INC.,)
Defendant.)

IDENTIFICATION OF THE EVIDENCE IN SUPPORT OF THE GOVERNMENT'S CONTENTION THAT CBS AND ABC HAVE VIOLATED SECTIONS 1 AND 2 OF THE SHERMAN ACT

Complaints were filed in these actions on December 10, 1974, charging that each defendant had combined with its affiliated stations to use its control over access to network air time to restrain and monopolize prime time television entertainment programming in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§1 and 2). 1/ Answers were filed on December 30, 1974, and substantial discovery has been accomplished by the parties since that time. However, one major area of discovery not even begun is the taking of depositions. The Court, on June 21, 1977, ordered the Government to identify the evidence in support of its allegations prior to the start of depositions.

The accompanying submission is being filed in accordance with the Court's order; it identifies the evidence upon which plaintiff presently intends to rely to establish that CBS and ABC have each restrained and monopolized trade and commerce in the prime time television entertainment programming offered for broadcast by its combined group of television stations affiliated with each of them. The submission is organized in chart form generally tracking Plaintiff's Supplemental Statement of Genuine Issues. 2/ The chart for each defendant is composed of 2 major sections; Section I covers the Section 1 Sherman Act charge and Section II covers the Section 2 charges. Each subsection of these covers a specific contention and lists the evidence supporting it, the source of the evidence and an identification of the source. Where the source of the evidence relied upon is a

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1/ These suits are similar to suits filed on April 14, 1972, which were dismissed without prejudice on November 14, 1974.

2/ Supplemental Statement of Genuine Issues, dated May 21, 1976.

tentative witness, only the witness's employment at the relevant time is noted as identification, but a complete description of his relevant employment is listed in Exhibit A, attached hereto. Where the source of a particular piece of evidence is a document, a stipulation, an admission, etc., a complete description is included in the chart.

Plaintiff has attempted to be as complete as possible and include all the evidence upon which it presently intends to rely. 3/ Yet the complexity of these cases and the discovery remaining make it extremely likely that additional evidence will surface. Undoubtedly the deposition process will stimulate or refresh memories, thereby providing new evidence or a different gloss on known evidence. To date, plaintiff, has not had the opportunity to elicit testimony from present or former employees of ABC or CBS. Further, there are over 7000 documents which CBS has withheld on grounds of privilege, the claim of which plaintiff is now challenging. Finally, both CBS and ABC are still in the process of producing documents concerning talent and literary

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3/ It should be noted that although plaintiff presently intends to rely on all the evidence contained in this submission, plaintiff may decide at some later date to eliminate some of it. Further, although plaintiff has identified a number of documents which support its contentions, this identification is not intended to preclude the introduction of supplemental supporting evidence.

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1. Defendants Have Restrained Trade in Violation of Section 1 of the Sherman Act.

Section I: The evidence as set forth here shows that both before and after the effectuation of the Federal Communications Commission's ["FCC"] Financial Interest and Syndication Rules 7/, each defendant's course of conduct has violated the Sherman Act by unreasonably restraining the ability of non-network producers to produce and distribute programming for network prime time television exhibition. Each defendant has also tied its consideration of such programming to the producer's grant to it of subsidiary rights and profit shares in non-network or non-prime time uses of the programming, such as domestic or foreign syndication, merchandising, music and literary publishing, theatrical direct projection, closed circuit television, video-discs, video-cassettes and pay cable or subscription television. The purpose or effect of each defendant's course of conduct has been to eliminate competition among the networks, and between networks and other television stations for prime time entertainment programs, and to restrain competition in secondary communications markets such as those listed above. 8/

Section I.A.: This evidence shows that prior to the effectuation of the FCC's Financial Interest and Syndication Rules, both CBS and ABC adopted a policy to obtain control

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7/ 47 C.F.R. §73.658(j)(i) and (ii).

8/ See, Memorandum In Opposition To Summary Judgment at 4-12 and cases cited therein.

over independently produced programs by requiring independent producers to relinquish subsidiary rights and interests in their programs as a condition of having their programs licensed for network broadcast. 9/ The evidence shows that both CBS and ABC sought control of programming to eliminate competition among the networks and to exclude advertiser-supplied programs.

Section I.A.1.: The success of CBS's and ABC's course of conduct is shown by the evidence presented here. In 1957, CBS produced or had a subsidiary right or interest in 49% of the programs broadcast on its network, but by 1967,

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9/ In Viacom International, Inc. v. Tandem Productions, Inc., 368 F.Supp. 1264 (S.D.N.Y. 1974), aff'd, 1975-2 Trade Cas. ¶60,636 (2d Cir. 1975), Tandem alleged that CBS had conditioned its agreement to telecast the program upon Tandem's grant of syndication rights to CBS. The Second Circuit, after holding that Tandem could not raise the allegations against Viacom, stated:

> If Tandem could prove these allegations in addition to demonstrating that CBS possessed sufficient economic power with respect to the exhibition of television programs appreciably to restrain free competition for distribution of those programs by tying the services to each other, then the contract would violate section 1 of the Sherman Act, 15 U.S.C. §1. Northern Pacific Ry. Co. v. United States, 356 U.S. 1 (1958). [¶60,636 at p. 67,779].

the figure had risen to 69% of such programs (73% if theatrical feature films are excluded). The change is even more dramatic with respect to ABC. In 1957, ABC produced or had a subsidiary interest in 31% of the programming broadcast on its network, while in 1967 its percentage had climbed to 86% (92% if theatrical feature films are excluded). 10/

Section I.A.2.: The evidence here demonstrates that, in furtherance of their policies of obtaining control over their respective network television programming, both CBS and ABC made programming decisions which favored broadcast of those programs in which they had a right or interest over those in which they had not obtained a right or interest, and over advertiser-supplied programs. Advertiser-supplied programs broadcast on the CBS Television Network declined from 40% in 1957 to only 11% in 1967. At ABC, advertiser-supplied programs declined from 41% in 1957 to only 4% in 1967. In 1977, no regularly scheduled prime time entertainment program series on either network are advertiser-supplied. 11/

10/ Since theatrical feature films are not produced originally for network television, they are not wholly comparable to such programs for this purpose.

11/ The evidence amply proves the unreasonableness of defendants' actions. While plaintiff does analyze the purpose or effect of CBS's and ABC's course of conduct, a final analysis, which depends upon the entirety of the evidence, must await the trial of these cases. Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969); Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464 (1962).

Section I.B.: The evidence here shows that in order to eliminate competition in the procurement of prime time entertainment programming, each network began to reject advertiser-supplied programs. When advertisers still supplied programs, there was some competition among the networks for popular programs because the advertiser was free to switch his program from one network to another when his contract for network time terminated each year. In the early 1960's, the networks began to reject virtually all advertiser-supplied programs to the point where advertisers stopped offering them. As a consequence of their exclusion of advertiser-supplied programs and their similar long term contract terms, the networks no longer compete for each other's programs and programs rarely switch networks. The elimination of advertiser-supplied programs from the networks during prime time has reduced the buyers of first run network programs from 50-100 to just three.

Section I.B.1.: This evidence demonstrates that at the time the networks were eliminating the competition of advertisers as direct purchasers of programs for nationwide network exhibition, each was foreclosing from advertisers and independent producers the most desirable exhibition time on their owned and affiliated television stations by insisting on high clearance rates for network originated programs. Once the networks became the only three buyers of prime time exhibition programming, they dictated the terms upon which they would license such programming from independent program producers.

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Section I.3.: The evidence here shows that independent producers have had no choice but to accept a network's demands for certain standard contract provisions which have the effect of restricting the exploitation of the program by anyone other than the network. The restrictive contract terms insisted upon by each network have restrained competition in a number of ways. First, the standard contract provisions required by the networks eliminate competition for first run rights to series during the initial 5-7 year network run, and inhibit competition for such rights at the end of a contract term because of restrictive first negotiation/first refusal provisions. Second, each network has been able to pre-set the license fee (price) it will pay to independent producers for their programs during the entire term of the contract (at least five years). Thus, while a network can and does raise the prices to advertisers for participations (spots) on any successful program, the independent producer is contractually bound to the network for a number of years at a pre-set fee. While there may be renegotiations of price, the producer is contractually bound to pre-set prices and precluded from seeking a competitive price from other potential purchasers. Third, these contracts have allowed each network to obtain rights which give them an unfair competitive advantage or eliminate competition in other secondary markets.

As chronicled earlier, before the effectuation of the FCC rules in 1972 and 1973, CBS and ABC conditioned consideration of an independent program upon the receipt of foreign and domestic distribution rights to it. This restricted competition among distribution companies, and gave CBS and ABC an unfair competitive advantage over them, since the networks were assured a substantial source of supply without competition from other distributors. The grant of distribution rights to a network also prevented the entry of new entrants into the distribution market, since independent producers were not able to retain such rights and start their own distribution companies. 12/ Similar rights were acquired with respect to merchandising, and for music or literary publishing. Although, effective in 1972, acquisition of those rights was prohibited by the FCC, both CBS and ABC still derive revenues from such then existing rights. 13/

12/ After the FCC rules prohibited the networks from obtaining such rights, Tandem, an independent producer, was able to retain rights to enough new episodes to distribute its own product.

13/ CBS and ABC have been further able to undercut the effect of the FCC Financial Interest and Syndication Rules by demanding exclusivity against network stripping or syndication of old episodes of program series during the entire term of the contract. In the event that CBS or ABC desires to strip the program during daytime or fringe time while the program is broadcast on prime time, the producer either must agree to the network's price and terms or the program will not be stripped. This gives each network a competitive advantage over the other two networks and deprives the producer of the ability to

Moreover, the contracts have the effect of preventing competition for new ideas for programs which may evolve out of a program. "Spinoff" provisions either entirely preclude the use of an idea, character or talent in another program series by anyone other than the primary network, or provide that network with a first negotiation/first refusal right which limits the producer's ability to sell spinoffs to other purchasers. 14/

Section I.C.: This evidence demonstrates that even since the effectuation of the FCC rules, CBS and ABC have not hesitated to use their market power to force independent producers to use their production facilities as a condition for licensing their programs.

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13/ continued
get competitive offers for stripping his program. [Network stripping means the broadcast of old episodes of a program series about 5 times a week on the network, usually during daytime, but can also cover the use of old series episodes for network broadcast one or more times a week during late night (11:00 p.m. - 1:00 a.m.).]

14/ Similar restraints result from contract provisions providing for network exclusivity as against other television uses such as stripping or syndication, exclusivity as against other media such as CATV, pay cable or cassettes, and creative control. These restrain not only the producer's ability to compete, but also cripple the ability of these new potentially competitive industries to develop.

Section I.E.: This evidence shows how CBS and ABC have used their entry into feature film production to unfairly disadvantage independent producers of films and other television programming.

Section I.F.: This evidence reflects the anticompetitive effects of CBS's and ABC's exclusive contracts with talent on competition in prime time entertainment programming.

In sum, the evidence in Section I of the charts demonstrates that CBS, ABC and NBC are prevented by their common licensing provisior from competing for programs which are being broadcast on another network, that individual television stations are precluded from freely and openly competing with the networks for first run product before it is broadcast on a network, and for exhibition rights to old episodes so long as the program series is still on a network, and that the independent producers lose the benefits of such potential competition.

2. Defendants Have Combined to Monopolize, Attempted to Monopolize and Monopolized Prime Time Entertainment Programming Shown on Each Network.

Section II.A.: Plaintiff has charged and this evidence demonstrates that each network has strung together a nationwide chain of Government granted monopolies in the form of television stations much like a pool of patents or a package of copyrighted works, and has violated Section 2 by using the combined monopoly power of each chain (1) to control the competition of other program suppliers who compete with the network in the related but distinct television entertainment production field, (2) to eliminate inter-network competition, (3) to eliminate the competition of non-network broadcasters and

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(4) to restrain trade in a number of secondary communications markets 15/ in sum, monopolize network television entertainment programm

Section II.B.: The evidence demonstrates that CBS and ABC have controlled or excluded competition for prime time entertainment programming on each network and have controlled prices. Both networks have used the collective power of their respective chain of owned and affiliated television stations to eliminate advertiser-supplier programs as a source of competition, to effectively prevent any competition among themselves for programs on the basis of price, or other terms or conditions, and to impair this ability of potential competitors to develop a number of secondary communications markets.

CBS and ABC know precisely what each other and NBC are offering with respect to prices, terms and conditions for independent programs, and each offers similar prices, terms and conditions for licensing similar programs. 16/ This unwillingness to compete prevents the operation of a free and open market in program procurement. Since CBS and ABC have each eliminated competition for prime time entertainment programming on its network, have each controlled the price for access to its combined affiliated stations, and have each controlled or eliminated program suppliers who were

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15/ See Memorandum In Opposition to Summary Judgment at 12-27.

16/ See Stipulation and Order, dated July 15, 1976, in United States v. American Broadcasting Companies, Inc.

unwilling to accept their dictated terms and conditions, they have unreasonably restrained trade and they have combined to monopolize, have attempted to monopolize and have monopolized the prime time entertainment programming broadcast on their owned and affiliated group of television stations. Section II.B. further demonstrates that CBS and ABC have used their respective monopoly power over access to obtain an unfair competitive advantage in such secondary markets as domestic and foreign syndication, merchandising, music or literary exploitation, theatrical direct projection, closed circuit television, video discs, video cassettes, and pay cable or subscription television.

Conclusion

The evidence outlined in this filing puts each defendant on notice of the evidence the Government expects to introduce at the trial of these cases. While certain additions may be made in the future, both sides are clearly now in a position to conduct their depositions expeditiously and proceed to trial.

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Respectfully submitted,

Dated: September 12, 1977

Bernard M. Hollander

Bernard M. Hollander

Barry J. Kaplan

Bernard J. O'Reilly

George W. Selby

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Kevin R Sullivan

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taken, which shall order or decree for either ABC or NBC injunctions different in terms or provisions than those required by this Final Judgment, or which shall result in the dismissal of either or both of such actions, CBS may apply to the Court and shall be granted a modification of or relief from any terms set forth herein as may be necessary to prevent CBS from being placed at a competitive disadvantage with respect to ABC or NBC.

(A) Within thirty (30) days after the entury of this Final Judgment, CBS shall furnish to its officers, directors, and appropriate employees and agents a copy of this Final Judgment, and each year for a period of ten (10) years thereafter CBS shall furnish a copy to all new officers, directors and appropriate employees and agents. CBS shall maintain a file listing all persons to whom it has furnished such copies.

(B) Within thirty (30) days after entry of this Final Judgment and once each year during the succeeding ten (10) calendar years following entry of this Final Judgment, CBS shall send a copy of this Final Judgment to the last known address of each independent program supplier known to have offered any entertainment program to CBS for inclusion in its schedule of CBS television network programs within the preceding five (5) years and to each person listed in the then current issue of Television Factbook as a provider of television production facilities.

XI.

(A) For the purpose of determining or securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice, upon written request of the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, and on reasonable notice to CBS made to its principal office, shall be permitted, subject to any legally recognized privilege:

(1) access during the office hours of CBS to all books, ledgers, accounts, cooresspondence, memoranda, and other records and documents in the possession or under the control of CBS relating to any matter contained in this Final Judgment; and

(2) subject to the reasonable convenience of CBS and without restraint or interference by it, the right to interview officers or employees of CBS, who may have counsel present, regarding any such matter.

(B) CBS, upon written request of the Attorney General or the Assistant Attorney General in Charge of the Antitrust Division, made to its principal office, shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be requested.

No information obtained by the means provided in this Section XI shall be divulged by any representative of plaintiff to any person other than a duly authorized representative of the Executive Branch of the United States, except in the course of legal proceedings to which the United States is a party, or for the purpose of securing compliance with this Final Judgment or as otherwise required by law.

XII.

Jurisdiction is retained by this Court for the purpose of enabling either party to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or modification of any of the provisions thereof, for the enforcement of compliance therewith, and for the punishment of violations thereof.

XIII.

Entry of this Final Judgment is in the public interest.

Dated: May 8, 1980.

____

United States District Judge

Appendix A [1]

(a) "Agricultural programs" include market reports, farming, or other information specifically addressed, or primarily of interest, to the agricultural population.

(b) "News programs" include reports dealing with current local, national, and international events, including weather and stock market reports; and when an integral part of a news program, commentary, analysis, and sports news.

(c) "Public affairs programs" include talks, commentaries, discussions, speeches, editorials, political programs, documentaries, forums, panels, round tables, and similar programs primarily concerning local, national, and international public affairs.

(d) "Religious programs" include sermons or devotionals; religious news; and music, drama, and other types of programs designed primarily for religious purposes.

(e) "Instructional programs" include programs (other than those classifed under Agricultural, News, Public Affairs, Religious or Sports) involving the discussion of, or primarily designed to further an appreciation or understanding of, literature, music, fine arts, history, geography, and the natural and social sciences; and programs devoted to occupational and vocational instruction, instruction with respect to hobbies, and similar programs intended primarily to instruct.

(f) "Sports programs" include play-by-play and pre- or post-game related activities and separate programs of sports instruction, news or information (e.g., fishing opportunities, golfing instructions, etc.).

Appendix B

Compliance Report—CBS Produced Programs

Compliance Period ________________________

No. weeks ______________________________

Prime Time Hours

Entertainment

Program name	Number minutes per week	Number weeks offered for network broadcast

Non-Entertainment

Program name	Number minutes per week	Number weeks offered for network broadcast

Daytime Hours

Entertainment

Program name	Number minutes per week	Number weeks offered for network broadcast

Non-Entertainment

Program name	Number minutes per week	Number weeks offered for network broadcast

Fringe Hours

Entertainment

Program name	Number minutes per week	Number weeks offered for network broadcast

Non-Entertainment

Program name	Number minutes per week	Number weeks offered for network broadcast

U.S District Court, Central District of California

United States of America, Plaintiff, v. *CBS INC.*, Defendant.

Civil No. 74-3599-RJK.

Filed: May 8, 1980.

Competitive Impact Statement

Pursuant to Section 2(b) of the Antitrust Procedures and Penalties Act (15 U.S.C. § 16(b)-(h) Pub. L. 93-528 (December 21, 1974)), the United States of America hereby files this competitive impact statement relating to a proposed consent judgment in the above-entitled action to be entered against the defendant, CBS Inc. ("CBS"). Entry of the proposed judgment should not, of course, bar the Government from bringing another action involving any aspect of CBS's operations should the facts warrant such an action in the future.

This proposed judgment is based in large part on the Final Judgment entered on November 28, 1977, in *United States v. National Broadcasting Company, Inc.*, 74-3601-RJK (C.D. Cal.).

(1) *Nature and purpose of the proceeding.* This action is one of three filed on December 10, 1974, against each of the nationwide commercial television networks,[1] charging that each had combined with its affiliated stations to use its control over access to network air time to restrain and monopolize prime time television entertainment programming in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2). This suit is similar to an earlier suit against CB, filed on April 14, 1972, which, with suits against the other two

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[1] Taken from 47 CFR § 73.670, n. 1 (1975).

[1] In addition to CBS, complaints were filed against American Broadcasting Companies, Inc. ("ABC") and National Broadcasting Company, Inc. ("NBC").

networks (ABC and NBC), was dismissed without prejudice to new filings by the Court on November 13, 1974. CBS's news, public affairs and sports programming are not involved in either this or the previous suit.

The complaint alleges that CBS used its control over access to the broadcasting time of the CBS Television Network during prime evening hours for the following purposes: to exclude from network broadcast those entertainment programs in which CBS had no financial interest; to compel independent program suppliers to grant to CBS financial interests in television programs which it accepted for broadcast; to refuse to sell air time to advertisers and other independent program suppliers seeking to have their own programs shown on the CBS network; to control the prices paid by CBS for television exhibition rights to motion picture feature films and to obtain competitive advantages over other producers and distributors of television entertainment programs and of motion picture feature films. In the complaint, the Government sought to have CBS enjoined from the following practices: obtaining any interest, except for the right of network exhibition, in independently produced programs; engaging in syndication of any television entertainment programs, producing entertainment programs itself, and using its control over access to the CBS Television Network to foreclose competition or obtain an unfair competitive advantage in any other field. The proposed judgment provides relief similar and substantially equivalent to that requested in the complaint.

(2) Practices and events giving rise to the alleged violation of the antitrust laws.

CBS is a substantial purchaser, exhibitor and producer of commercial television programs. There are approximately 700 television stations in the United States which are licensed by the Government to broadcast commercial television programs. CBS operates a national television network which provides television programs and related advertising messages to approximately 200 affiliated television stations located throughout the United States and to the five television stations which are owned and operated by CBS (in New York City, Los Angeles, Chicago, Philadelphia and St. Louis).

Commercial television programs are created and produced by television networks, television stations, and independent program suppliers, including motion picture studios. In 1973, the three nationwide commerical television networks (CBS, ABC, and NBC) spent more than $1,000,000,000 for television programs, of which CBS spent more than $340,000,000. In 1973, total television broadcasting revenues for the aforementioned three networks were in excess of $1,400,000,000, of which CBS received more than $500,000,000.

The value of any television program to its producer, and to an advertiser whose message is broadcast in conjunction with it, depends in large part on the number of television viewers who see the program and observe the commercial messages. CBS, through its affiliated television stations, has control over access to approximately 98 percent of all United States television households for programs which it offers for broadcast. This is because during prime evening hours [2] when television viewing is at its peak, most of the 200 CBS affiliated stations and all the CBS owned and operated stations depend upon CBS for virtually all of their television entertainment programming. In early 1978, for example, CBS's primary affiliates [3] and its owned and operated stations broadcast over 90 percent of the programs regularly offered by the CBS Television Network during prime evening hours.

The commercial value of a television entertainment program is not exhausted by its first network showing. It may also be stripped (broadcast a number of times per week) by a network. Frequently, usually after its network run is completed, a program is distributed to individual television stations in the United States for non-network broadcast (this is generally referred to as syndication). In addition, a program may be distributed to foreign television stations while it is appearing over a domestic television network. Merchandising, literary and music rights in a television program could also provide substantial revenue to the producer.

There is a substantial economic incentive for CBS to gain control of programming on its network, and CBS has exercised its control over access to the viewing public so as to exclude from the CBS Television Network programs controlled by others. One effect of this is to reduce the number of program purchasers with a resultant lessening of competition for television programs. For example, in the 1950's and early 1960's, advertisers were able to purchase television entertainment programs acceptable to CBS from independent program suppliers for broadcast on air time purchased from the CBS Television Network. In November of 1957, approximately 40 percent of all entertainment program series offered by the CBS Television Network during prime evening hours were advertiser-supplied; thus, advertisers constituted a substantial market for independent program suppliers. However, by November, 1967, only 11 percent of all entertainment program series offered by the CBS Television Network during prime evening hours were advertiser-supplied. At the present time, no such series is advertiser-supplied.

CBS embarked upon a policy of replacing advertiser-supplied programming with programs which it controlled through internal production, exclusive long-term network licenses, or talent exclusivity. Often CBS obtained rights or interests in excess of network exhibition. While, in November, 1957, only approximately 49 percent of all prime time entertainment program series offered by the CBS Television Network were programs which CBS produced or in which it had subsidiary rights or interests, such programs constituted 88 percent of all prime time entertainment program series offered by the CBS Television Network in November 1967.

As a result of this situation, which obtained on all three networks, the Federal Communications Commission ("FCC") promulgated rules which forbade CBS, ABC, and NBC from exacting certain financial interests or syndication rights in television programs from independent producers. 47 C.F.R. § 73.658(j).[4] However, despite the FCC financial interest and syndication rules, CBS and the other networks continued to exact from producers such rights as: (1) long-term yearly renewal options for exclusive CBS network exhibition of the program with pre-set license fee escalation rates; (2) exclusive use of the program by CBS as against other communications markets; (3) exclusive rights in CBS with respect to program spinoffs; (4) creative program controls in CBS; (5) CBS's right to all profits from network exhibition of the producer's program; and (6) a CBS right of first refusal at the end of the option period.[5]

Were this case to go to trial, the Government would contend that CBS had used and continues to use its dominance and control over access to the broadcasting time of the CBS Television Network, to condition independent program suppliers' access to said network upon the suppliers' relinquishing valuable rights and interests in their programs, and that this course of conduct violates Sections 1 and 2 of the Sherman Act. The Government would also contend that CBS has favored programs in which it obtained such rights and interests over other programs, with the result that trade and commerce in CBS's prime time television entertainment programming has been illegally restrained and monopolized. Finally, the Government would contend that CBS's unrestricted ability to produce prime time television entertainment programming, together with its control over access to its television network and its past and present restrictive course of conduct, constitutes an unreasonable and unlawful restraint of independent program suppliers' ability to produce and negotiate for distribution and exhibition of their programming.

(3) The proposed consent judgment and its *anticipated effect on competition.*

The proposed judgment is directed at minimizing the substantial advantage CBS has acquired in television programming because of its market power as one of the three nationwide commercial networks, which not only purchase and exhibit but also produce television programs. The structure of the market is such that each of the three networks controls program producers' and advertisers' access to the nation's commercial television audiences, and each network has abused its power by refusing access to programs which it did not produce or in which it had no financial interest. Consequently, the only meaningful relief that can be obtained short of restructuring the networks is to limit network program production and restrict the program rights that each network may obtain from outside suppliers to the rights essential to networking, which are those incident to the right to exhibit the program. This the proposed CBS judgment seeks to do. It would establish specific outer limits on CBS's own program production and on the type of rights and interests which CBS may acquire from independent program suppliers in addition to the right of network exhibition. This should minimize CBS's incentive to select a program on the basis of financial interests in it. The judgment does not, of course, require independent program producers to grant to CBS particular rights and interests, even to the extent permitted. However, it is anticipated that because of the proposed judgment, the forces of competition would be able to operate more freely on CBS's program procurement practices.

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[2] 8:00 p.m. to 11:00 p.m. in the Eastern and Pacific time zones. 5:00 p.m. to 10:00 p.m. in the Central and Mountain time zones.

[3] A CBS primary affiliate is a television station to which CBS generally offers first call on television programs which it offers for broadcast.

[4] Such rights and interests included distribution rights and profit shares for domestic and foreign syndication of the program, and for merchandising, music and literary rights.

[5] At the same time, similar practices have been followed by ABC and NBC with respect to programming on their networks. The existence of uniform terms and conditions of purchase among the three major networks acts to deprive independent program suppliers of the benefits of network competition for their programs. Moreover, the network practice of obtaining exclusive exhibition rights often occurs at a time when the program is in the idea or script stage and the program supplier has little or no bargaining power.

The following is a discussion of the key provisions of the judgment:

Section IV

The proposed judgment would enjoin CBS from acquiring syndication and other distribution rights or profit shares in the non-network exploitation of television entertainment programs produced by others, and would thereby permanently preserve the prohibitions in the FCC's financial interest and syndication rules. To prevent CBS from utilizing its inherent competitive advantage over other domestic syndicators, the proposed judgment would prohibit domestic syndication of programs by CBS, but, consistent with the FCC's rules, would allow CBS-produced programs and certain foreign programs to be distributed by CBS in foreign markets.

Section V

The judgment would enhance competition in television entertainment program production and exhibition by eliminating the possibility that CBS could substantially increase its internal production of its network programs and thereby exclude independent program suppliers. For a period of 10 years it would limit the amount of television entertainment programming which may be produced by CBS to no more than: two and one-half hours per week in prime time hours,[6] eight hours per week in daytime hours (9:00 a.m. to 6:00 p.m. in the Eastern and Pacific time zones and 9:00 a.m. to 5:00 p.m. in the Central and Mountain time zones), and eleven hours per week in fringe hours (11:00 p.m. to 2:00 a.m. and 6:00 a.m. to 9:00 a.m. in the Eastern and Pacific time zones and 10:00 p.m. to 1:00 a.m. and 6:00 a.m. to 9:00 a.m. in the Central and Mountain time zones).[7]

Section VI

The complaint alleges that CBS uses its control over access to its national television network to gain an unfair competitive advantage in other fields. Section VI contains prohibitions designed to prevent this from occurring and to give those competing in such other fields an opportunity to compete free of the artificial leverage which CBS, and the other networks, have exercised in the past. Because of the regulatory nature of many of the injunctions in Section VI, and the possiblity of changes in the industry, the Department has determined that the prohibitions should contain the time limitations spelled out in this section [15 years for subsections (B), (C) and (E) and 10 years in subsections (D), (F), (G), (H), and (I)].

VI(A)

The judgment would prohibit CBS from purchasing or offering to purchase exhibition rights to an independent program supplier's television entertainment program on condition that the supplier would grant CBS any right or interest other than those incident to network licensing and use of the program. This continuing injunction is based on the assumption that CBS, and the other two existing commercial television networks, will continue to have substantial market power for the foreseeable future.

VI(B)

To specifically clarify the scope of Section VI(A), this provision would assure that CBS would not, in connection with its acquisition of network exhibition rights, require that the supplier use CBS production facilities. It would expire in fifteen years.

VI(C)

For a period of fifteen years, any facilities contract between CBS and such a program supplier would be limited to the period required to produce one year's episodes, with a right to renew the contract at the end of each year.[8]

VI(D)

To guard against CBS's possible avoidance of its program production limitation through reciprocal dealing with other networks, for a period of ten years, CBS would be prohibited from purchasing network exhibition rights to any ABC or NBC entertainment program on condition that ABC or NBC purchase similar rights from CBS.

VI(E)

For a period of fifteen years, the proposed judgment would place the following outer limits on the exclusive rights that CBS may acquire from an independent program supplier in obtaining network exhibition rights for a prime time entertainment program (the supplier can, of course, grant CBS fewer and lesser rights than these):

For program series [VI(E)(i)]:

CBS's initial contracts with program suppliers for the production and network exhibition of a prime time entertainment program series could not include exclusive yearly options for more than four years and the balance of any broadcast year in which such four year period ends. However, CBS could, pursuant to the limitations set forth in this provision, renegotiate the contract with the supplier to provide for additional options as follows:

(a) *In the case of a program series which commences at the start of a broadcast year:* CBS could begin negotiating in or after the Spring of the first broadcast year for an additional one-year option, but only upon CBS's exercising its existing option for the second broadcast year could it enter into an agreement for the additional one-year option. At no time after CBS exercises its option to go to series could CBS hold more than three years of additional options to programs in this category. CBS and the supplier can negotiate a contract for an additional option at any time in or after the Spring of the first broadcast year, so long as the maximum of four years of options is not exceeded. To illustrate, if they wait until the Spring of the second broadcast year, CBS may negotiate for at most two years of additional options; if they wait until the Spring of the third year, CBS may negotiate for at most three additional options. [VI(E)(i)(a)]; [10]

(b) *In the case of a program series which commences after the start of a broadcast year:* CBS could negotiate, after twelve months subsequent to the date of first broadcast, for an additional one-year option, but CBS need not wait until it exercises its option for the following broadcast year before entering into an agreement for the additional one-year option. In subseqùent broadcast years, CBS may negotiate for and obtain additional options so long as it at no time holds options for more than four years and the balance of any broadcast year in which the four-year period ends. [VI(E)(i)(b)].

In either situation, CBS and the supplier are free to negotiate for additional options at any time after CBS obtains, if it does, an additional option year, so long as the maximum limits are observed. They are, of course, also free to abstain from any additional negotiations or to negotiate for less than the limits set forth in the proposed judgment. When the contract approaches the end of its term, the supplier would be free to offer the program to others, subject only to CBS's first negotiation/first refusal rights by CBS.[11, 12]

IV (E)(ii)

CBS could not prohibit the use of any prime time television program in other domestic communications markets for more than three years.[13] except that CBS may obtain four years of exclusivity as against nonprime time stripping (the broadcast of program series episodes more than once a week after their network exhibition),[14] and may have exclusivity for prime time use of the program during the life of CBS's right to network exhibition. This provision should free a substantial number of entertainment program series for syndication and other uses much earlier than is currently possible.[15]

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[6] For definition, see n. 2, supra at p. 4.

[7] CBS would also be allowed to produce two additional special programs every six months. CBS will report to the Department of Justice, semi-annually, its own program production during the preceding period.

[8] This provision would not take effect until similar relief is obtained against ABC. See discussion of Section VII, infra at p. 20.

[10] If negotiations are conducted in any Summer, Fall, or Winter after the Spring of the first broadcast year, CBS is limited to that which it was permitted to acquire in the Spring which preceded such negotiations. If the initial contract term were three years, rather than four, CBS could negotiate for at most two years of additional options during the first Spring following initial broadcast.

[11] CBS's permissible first refusal rights for new contracts, exercisable at the end of any contract term, could not prohibit the program supplier from entering into a new contract with someone else at the end of any contract term, if the terms were equal to or better than the supplier's last offer to CBS.

[12] This provision would not take effect until similar relief is obtained against ABC.

For theatrical feature films [VI(E)(iii)]:

(1) CBS cannot acquire exclusivity as against exhibition of feature films by theatrical and nontheatrical direct projection, on closed circuit TV in nonresidential hotels, motels, bars, restaurants, and hospitals, or on passenger-carrying vehicles.

(2) CBS cannot acquire exclusivity as against use of feature films in discs, cartridges or cassettes.

VI (F)

Program selections for each network's new fall season are generally made in the preceding spring, and for "second season" replacement, in the preceding fall. For a period of ten years, this provision would prevent CBS from retaining its exclusive options to more than 35% of the program pilots not selected by it, after CBS's program selection for the next broadcast season has been made. This provision would permit increased competition between the networks by freeing the producers of as many as 65% of the program pilots not selected by CBS to offer their pilots to other networks or television stations.[16]

VI(G)

To protect independent program suppliers' rights to additional program ideas developed from program series on CBS, for a period of ten years this provision would limit CBS's ability to obtain exclusive rights to spinoffs [17] from such series to situations involving continuing characters. Where the spinoff involves a non-continuing character,[18] CBS may obtain no contractual option beyond first negotiation and a limited first refusal right.[19] [20]

VI(H)

This provision would limit CBS's use of repeats acquired as part of Network Exhibition, to the same year as that in which the initial episodes of the program series are broadcast. However, as to three episodes of each series per year, there would be no limitation on rerunning them in subsequent years. Also, once it had ordered program series episodes for the first year of broadcast, CBS could purchase additional repeats for subsequent years. Finally, CBS would not be limited in purchasing repeat rights of made-for-television and threatrical feature films, specials, or cartoons or other children's programs.[21]

VI(I)

This provision would prevent CBS from asserting or exercising any right in any agreement with continuing [22] performing or essential [23] creative talent which is providing services in connection with a particular prime time series licensed to CBS so as to preclude such talent from being able to continue to provide services in connection with that series if it were licensed to any other licensee. This prohibition lasts for ninety days after CBS's options for that series have expired. This provision would permit the program supplier to take a series which has run out its term, or which has been cancelled by CBS, to another network or television station, with the essential talent still in the series even though CBS may have the essential talent under contract.

The ninety day period is designed to provide a reasonable time during which the program supplier could attempt to license the series, but not so much as would prevent the talent and CBS from being able to proceed with assurance on some alternative project if the series remained unlicensed.[24]

This provision would in no way limit the talent's freedom of choice. The talent would be free to stay with CBS, or to continue with the series, a choice which might otherwise be foreclosed by an exclusive agreement with CBS. While this provision does not limit CBS's ability to offer the talent projects which are alternatives to continuing with the series, it prohibits use by CBS of an existing agreement to prevent the talent from being able to continue with the series.

After the expiration of ninety days, CBS would be free to attempt to enter into a new agreement with the talent for the exclusive use of such talent's services, whether or not the series has been licensed to another licensee. Further, this provision would not affect the contracts between the talent and other suppliers or licensees. Nor would this provision prevent the talent from providing services to the series, if contractually free to do so, if the series were licensed to another licensee after the ninety-day period.[25]

Section VII

In order to avoid placing CBS at a competitive disadvantage with respect to ABC or NBC, this provision would delay the effectuation of certain Sections of the judgment [V, VI(C), VI(E)(i), VI(F)–(I), and VIII(E)] until similar injunctive relief is obtained against ABC. Similar injunctive relief has already been obtained against NBC.[26] While this type of provision is unusual in an antitrust judgment, it is warranted by the unique nature of this industry, and the pendency of the companion action.

Section VIII

This provision describes certain areas of CBS activity with which the judgment would not interfere. They are: (1) CBS's ability to acquire rights for non-network broadcast by its owned and operated television stations and rights for non-broadcasting uses, and CBS's ability to sell, license or distribute foreign or CBS produced programs abroad, provided that none of the above rights are acquired in connection with CBS's acquisition of rights for the exhibition, distribution or use of a CBS television network program; and (2) CBS's ability to recover money advanced in connection with the development or production of a television network program.

Section VIII(E) imposes no specific limitation on CBS's use of an exclusive agreement with performing or creative talent when it decides not to take a pilot to series. However, if CBS should circumvent Section VI(F) by using exclusive talent agreements to inhibit program suppliers' ability to program suppliers' ability to license CBS rejected program concepts elsewhere, this provision permits the Government to obtain appropriate relief against such conduct without having to justify a modification of the judgment.[27] [28]

Section IX

If a non-appealable judgment were entered dismissing the companion action against ABC, or decreeing injunctions in that action which were different from those in this proposal judgment, or if the Final Judgment entered in the NBC action on November 28, 1977, were modified in such a manner, CBS would be permitted to seek and obtain whatever relief, if any, were necessary to prevent it from being placed at a competitive disadvantage with respect to ABC or NBC. While this type of provision is unusual in an antitrust judgment, it is warranted by the unique nature of this industry, and the pendency of the companion action.

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[13] CBS presently has exclusive rights for the duration of its network exhibition contract.

[14] The judgment would not permit CBS to obtain further stripping rights from the suplier until after it has ordered its first year's episodes for network exhibition.

[15] To permit contract adjustments, this provision would take effect thirty days after entry of the final judgment.

[16] This provision would not take effect until similar relief is obtained against ABC.

[17] A spinoff is a new series evolving from an episode or character of a series currently being offered for broadcast.

[18] A non-continuing character is one who appears in no more than 25% of the original episodes during the twelve months prior to the time exhibition rights for the licensing of such spinoff are offered by the independent supplier.

[19] The first refusal right would be limited as discussed in n. 8, supra at p. 12.

[20] This provision would not take effect until similar relief is obtained against ABC.

[21] This provision would not take effect until similar relief is obtained against ABC.

[22] In this context, a continuing talent is one who appeared in more than twenty-five percent of the original episodes of the program series during the twelve months prior to cancellation or expiration of CBS's options for that series. [See Section VI(G)].

[23] The term "essential" is not limited to those persons who are "of the essence" in a license agreement; rather, it describes those persons whose services are reasonably necessary to the successful continuation of the series in the manner it has been produced for CBS.

[24] The ninety-day period was suggested by Section 24(c) of the 1977 Screen Actors Guild Television Agreement.

[25] This provision would not take effect until similar relief is obtained against ABC.

[26] See Final Judgment in *United States v. National Broadcasting Company, Inc.*, 74-3601–RJK (C.D. Cal.), entered on November 28, 1977.

[27] A similar provision was entered into by NBC and the Government which covered the use of exclusive rights to talent to circumvent any provision of the judgment. Stipulation and Order, dated may 4, 1977. *United States v. National Broadcasting Company, Inc.*, 74-3601–RJK (C.D. Cal.).

[28] This provision would not take effect until similar relief is obtained against ABC.

Section X

This provision would require CBS to furnish copies of this judgment to all its officers, directors, and appropriate employees and agents within thirty days after its entry, and for ten years thereafter to furnish copies to all new CBS officers, directors or appropriate employees, to each independent program supplier known to have offered any entertainment program to CBS within the preceding five years, and to all known providers of television production facilities.

The consent judgment would afford ways of determining compliance by permitting the Government, upon proper notice, to interview CBS employees, secure reports from CBS and inspect CBS documents and records.

The District Court would retain jurisdiction of the case to permit any necessary construction or modification of the judgment, to enforce compliance and to punish any judgment violation.

Stipulation and Order

The proposed consent judgment is subject to a stipulation between the United States and CBS that, when ordered by the Court, the Stipulation and Order providing for the entry of the CBS consent judgment shall not estop the parties or any person in this or any other action from asserting any issue of fact or law concerning CBS's acquisition of exclusivity for the exhibition of theatrical feature films as against pay television.[29]

(4) *Remedies available to potential private plaintiffs.*

Any potential private plaintiffs who might have been damaged by the alleged violations will retain the same right to sue for monetary damages, and any other legal or equitable relief to which they would have been entitled were the proposed judgment not entered. However, this judgment may not be used as *prima facie* evidence in private litigation pursuant to Section 5(a) of the Clayton Act, as amended, 15 U.S.C. § 16(a).

(5) *Procedures available for modification of the proposed consent judgment.*

The proposed consent judgment is subject to a stipulation between the United States and the defendant which provides that the United States may withdraw its consent to the proposed consent judgment at any time before the Court has found that entry of the judgment is in the public interest. By its terms, jurisdiction of this action is retained by the Court in order, among other things, to permit either of the parties to apply for such orders as may be necessary or appropriate for its modification.

As provided by the Antitrust Procedures and Penalties Act, any person believing that the proposed judgment should be modified may, during the sixty-day period prior to the effective date of the proposed judgment, submit written comments to the United States Department of Justice, Bernard M. Hollander, Chief, Judgment Enforcement Section, Antitrust Division, Washington, D.C. 20530, which will file with the Court and publish in the Federal Register such comments and its response to them. The Department of Justice will thereafter evaluate any and all such comments and determine whether there is any reason for withdrawal of its consent to the proposed judgment.

(6) *Alternatives to the proposed judgment considered by the United States.*

A full trial on the merits was considered as an alternative to settlement. However, because the agreed to relief would be substantially equivalent to that sought in the complaint, because significant relief would become effective upon entry of the judgment, and finally because appeals following a trial could delay the obtaining of effective relief for a period of years, the alternative of a trial on the merits was rejected.

In addition to considering provisions substantially similar to those contained in the proposed judgment, proposals considered by the Government and then rejected included the following:

(a) Section VI(E)(1) was the subject of intense negotiation between the parties. Although not specifically requested in the complaint, an important element of the proposed judgment is the initial four year limitation on yearly options obtainable by CBS when it contracts for the production and possible exhibition of a new program series. As in the NBC situation, the Government initially proposed a two year limit on the option period, and various compromises were considered, including, of course, that obtained in the NBC Final Judgment. Agreement was reached by shortening the permissible length of the option term to four one-year terms, instead of the permissible total five year term in the NBC Judgment, but permitting CBS and program suppliers the flexibility of negotiating for additional one-year options in the Spring of the first broadcast year and in subsequent broadcast years.

(b) As to Section VI(I), the Government initially sought to include as "in-house" produced programs which are limited by Section V, any program in which a performing or creative talent exclusive to CBS provided essential services. This provision was sought to prevent CBS from designating as a non "in-house" program, one over which it maintained a large degree of control through an exclusive talent agreement. A more direct solution was reached by prohibiting CBS from exercising any exclusive talent agreement so as to prevent the talent from staying with a program series which its supplier was able to license to another network or station within ninety days after the expiration of CBS's options for that series.

When the parties agreed to the concept, the Government sought to extend it to pilots which did not go to series, as well as to series which CBS dropped. It sought to do so by prohibiting CBS from using exclusive agreements with talent to prevent rejected series concepts based on pilots from being marketed to other networks or stations. Based, in part, on the lack of sufficient proof that CBS had, in fact, utilized exclusive agreements with talent for such a purpose, and also upon the recognition that pilots are part of the development process of a potential program series, and that CBS has a legitimate interest in attempting to develop successful program concepts with its exclusive talent (which may require more than one pilot to be made), a compromise was reached which permits the Government to seek additional relief upon a showing that CBS has used exclusive rights to talent to circumvent the pilot section of the judgment [Section VIII(E)].

(c) With respect to CBS's exclusive rights to the exhibition of theatrical feature films as against pay television, plaintiff was convinced during pre-trial discovery that such rights should be curtailed.[30] However, the relief initially obtained in the proposed NBC judgement was almost uniformly criticized by the commentors as establishing a detrimental industry standard. Unable to reach an agreement with CBS on a more limited period of exclusivity, the parties determined to include no provision as to exlusivity for theatrical feature films as against pay television in the proposed judgment. As in the NBC case, however, the parties have stipulated that this non-inclusion does not estop any possible future action in this area by any person, and does not constitute any evidence or admission respecting any related issue of fact or law.

Finally, had the Government prevailed at a trial on the merits, it would have considered seeking a Court order voiding CBS's existing contracts with independent program suppliers and providing an opportunity for all such suppliers to negotiate new contracts in light of the then-existing circumstances.

(7) *Determinative Documents.*

There are no materials or documents which the Government considered determinative in formulating the proposed consent judgment. Therefore, none is being filed with this competitive impact statement.

Dated: May 8, 1980.

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United States v. Rockwell International Corporation, et al.; Proposed Final Judgment, and Competitive Impact Statement

Notice is hereby given pursuant to the Antitrust Procedures and Penalties Act, 15 U.S.C Section 16(b) through (h), that a proposed Final Judgment, Stipulation and Competitive Impact Statement (CIS) have been filed with the United States District Court for the Eastern District of Pennsylvania in *United States of America v. Rockwell International.*

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[29] A similar agreement was entered into by NBC and the Government. Stipulation and Order, dated May 4, 1977, *United States v. National Broadcasting Company, Inc.*, 74-3601-RJK (C.D. Cal.).

[30] The corresponding NBC situation is discussed in the Competitive Impact Statement filed in *United States v. National Broadcasting Company, Inc.*, 74-3601-RJK (C.D. Cal.) on November 17, 1976.

Senator Hatch. Mr. Geller.

Mr. Geller. Thank you, Mr. Chairman. I think that the hearings have focused very little on the main issue, and with respect to that main issue I am going to surprise you by telling you that you the Congress settled it in 1982. You have settled the issue that is before you.

The issue is not as you said, an economic one, the one that the Department of Justice——

Senator Hatch. Well, I think it is that, too.

Mr. Geller. But the main issue—that is why I emphasize "main"—in the report and order on 7-7-7 rule was to diversify the ownership of these media in the national arena. That is what it was about, not in the local arenas but in the national one, and it was to promote diversification the Commission said, because of the Associated Press principle.

I am not disagreeing with you that there is an economic component, but the main reason for these rules was to diversify the ownership of these very powerful media. Television is the way people get news, it is licensed by the Government, it is in very short supply, and since the Government is passing it out, it is in the public good to diversify that ownership.

If you look, Mr. Chairman, at the top 25 markets, where close to 50 percent of the population is, there are less than 100 VHF frequencies there. And the issue that is before you is, are you going to diversify the ownership of those 100 VHF frequencies by limiting one entity's ownership to no more than five, or are you going to allow one person to have this concentration of 12 or to own any number.

In the *Associated Press* case, the Supreme Court said that the underlying assumption of first amendment is that the American people get information from diverse and antagonistic sources. The FCC in 1975 said nothing is more important to the public interest than that principle. That was under Chairman Wiley. And the Supreme Court affirmed in 1978. But as I said, the most important point to make to you is that in 1982 Congress considered this issue and ruled that it wanted Associated Press followed. The Commission was inundated by applications for low power, so it came to Congress and said it wanted to use a lottery. Congress said you can use a lottery, but we still believe in diversification, we still want Associated Press followed.

So what Congress was saying and built into the law was even when you are passing out "beltway stations," even when you are giving out low power, the FCC has to follow the diversification principle. I think therefore that settles the matter as to these full power ones. It is a very recent congressional decision—in 1982.

In any event, I think it is a correct decision. You should not reconsider it here. The Commission says there is now an abundance of television. But unlike radio, television has grown very little. Radio has had thousands of additional stations. Since 1965, there have been 250 more TV stations. Since 1975, 150. That is all. And there are no frequencies open in the major markets.

The number of VHF stations is very limited. Look at the growth there. In 1960 there were 414. Ten years later, in 1970 there were

508. And 10 years later, when you get to 1980, there are 518. So they are scarce. The marketplace tells you how scarce they are.

Last year, in Houston, a VHF station passed hands for $342 million. The physical assets are not worth more than $42 million. The $300 million is the piece of paper, the scarcity. It is still there.

Chairman Fowler says you have a television of abundance coming because of the new media. But OBS is questionable. You do not know whether it will make it. It is not here. The same thing is true of low power, MDS. They are all just possibilities. They are not here now. When you look at cable, as you have heard, it has 40 percent penetration of TV homes and a majority of cable systems have still 12 channels; or less the penetration of cable levels off at about 55 percent.

So what I am saying is that the congressional judgment in 1982, which said to the FCC that diversification is so important that you must follow it even as to low power TV, is a correct judgment; you certainly ought to follow it here.

Finally, there are no benefits you are going to get by breaking the rule. You are just going to hurt diversification and hurt the public interest. The idea that Metromedia needs to own more stations in order to do ad hoc networking is phoney. Metromedia can own seven stations—a sufficient base; it has to make affiliates, to make contracts with other stations, in order to get into many other markets. It cannot buy stations at $200 million or more a crack.

And the idea of letting the networks own more is even phonier. The networks are not going to supply any more programming, so what Chairman Fowler said is, you let them own more because they do better local service.

The best local service in the United States can be done also by singly owned stations, by a WCVB-TV in Boston, singly owned for years. But in any event, Mr. Chairman, this Commission is not interested in local or informational service. It has deregulated television. It has said that it does not care what amount of such service is done. If it were truly interested in public service programming, it would adopt a percentage for information or local service to indicate what meritorious service is.

If the FCC believes what it says, in a comparative hearing here in Washington for a new VHF vacant frequency, it is saying that CBS ought to win because it will do better local service. That stands diversification on its head and makes no sense, I stress to you that the correct decision made by Congress in 1982, and you ought to adhere to it. Thank you.

Senator **Hatch**. Thank you, Mr. Geller.

Mr. McGorrill.

Mr. **McGorrill**. I could be awfully swift, Mr. Chairman, and I will certainly try to be. We have submitted a statement and I truly ask that the committee read it. It is only four pages long and it may be the smallest one that is submitted in this whole proceeding.

My name is Bruce McGorrill, and I am the chief executive, Office of the Maine Broadcasting System, licensee of WCSH-TV in Portland, ME, and WLBZ-TV in Bangor, ME. We are the 75th market and the 155th market. Our company has been owned by the same family since 1925. This is my 31st year as an employee of that company and I come to you today with no vested interests other than a commitment to a principle.

The principle is very basic and it has not been raised in this entire day and it is one I ask this committee to bear in mind—I ask Congress to bear in mind. The broadcast system of the United States is unique in the world. It is the only one of its kind where Government has no automatic right to access.

In Canada, the Government owns a network. In England, they own two networks. In France, the entire telecommunications system is the function of government. But in this country, if this committee, if the White House where you are going this afternoon, Senator, asks for air time tonight, they have to ask. They have no automatic right to access. That decision is granted by the licensees, a subject that has not been discussed here today.

It is not three entities that we are talking about. It is the licensees who make the decision. We are the gatekeepers in the 75th market and the 155th market; we are the gatekeepers. There are not three giant gates to be raised. There are hundreds of gates to be raised.

Or concern is—and we are in opposition to any substantial change in the total number of stations anybody can own. Our concern is that down the road, looking years beyond when any of us might be here, that if the concentration of ownership of VHF stations in this country comes into a small number of hands, Congress, Government may decide that that is too much of a wall of opposition and decide to rewrite the rules and grant for itself the automatic right to access, and there, Senator, goes a freedom that this country has that no one talks about, the press does not talk about it, that we think very sincerely is one of the great freedoms in this country.

The Government cannot get on our air tonight unless the individual licensee says it is so. It has been a marvelous balance between broadcasters and Government over the years. That request and the acquiescence has been given for the benefit of the public that the broadcasters serve. There have been a few instances which I will not go into now where finally broadcasters did say no to the White House. But the need for this has been balanced by all sides because this is an industry under 7-7-7 rule which was fractionalized in number and localized in interest and it never presented any formidable wall for the Government in opposition.

We make the decisions locally. Ironically, total elimination of broadcast rules advocated as a deregulatory measure could eventually result in more Government regulation. The rule has not hindered the industry, Senator. Television has grown enormously, successfully, as we have heard today, under 7-7-7 rule. It is not broken and we do not need to fix it.

We further submit for your consideration that the television industry is only 35 years old. It may be our naivete, living in Maine, but we are still in awe of television's impact and feel that its potential has not yet been fully explored. There is occasionally the fear that someone will discover how to misuse that potential. As television is still young, we think increased concentration of ownership to anybody should be restrained, and on that basis, we oppose any substantial change.

Today I have heard the "beat up on the network day." As an affiliate and from a small market—and this may be a viewpoint that this committee or Washington rarely will ever hear—I would like to defend the networks. I cannot defend them for everything, but I would like to defend on a few points.

First of all, the word "network" is a plural noun. There is no network without the 200-plus affiliates. They—NBC, ABC, and CBS—do not put on the shows that people have complained about. We put them on, the local licensee licensed by the Federal Communications Commission. The network can put it on the microwave—in NBC's case soon to be on the satellite, but it is we who air it and it is our responsibility. The complaints should come to us.

The nonclearance of poor programs is a fact and I did not come prepared to put it in the record but there are many cases across the country where stations have not cleared. But we are responsible

I was very interested in Mr. Turner's righteous indignation of the networks and the filth he says they put on, but I trust you will remember that there was a great debate over the transmitting of the New Bedford rape trial and whether that should have been done in the complete fashion in which it was done, and that was Mr. Turner and he got ratings with that and immediately wanted to televise to access the child molestation trial in California because that got media. I think we should balance whose ox is being gored here.

When people talk about local affiliates being robots or automatically acquiescing—you brought up, Senator, earlier in the day the matter of the hour news. The networks could not push that through on the affiliates. The affiliates said no.

So in summary, I would please ask that you consider that things may not be perfect in the communications here in Washington from affiliates as well as the networks about what a network represents, but I can assure you that affiliates are vociferous, the networks must listen to them, but in the final analysis, it is the local affiliate that puts it on the air. Please separate the network as a group operation and the network as a network. They are two entirely separate situations and one should not be laid on the other in condemnation.

In final summary, our position is, please, very little, if any, change in the number of stations anybody can own. If it is changed, we see no reason as a small operation in the State of Maine that the networks should be penalized anymore than anyone else.

Thank you very much, Senator.

Senator HATCH. Thank you. I am grateful to all of you for the testimony that you have brought to us today This has been a very interesting hearing to me and I can see all sides of the issue a little bit more clearly from this hearing, although I think we still have to do a lot of studying on this matter. So I want to thank the three of you for being here. The other two have submitted statements and I thank everybody who has been here today.

With that, we recess these hearings until further notice.

[Whereupon, at 3:45 p.m., the committee was recessed, to reconvene subject to call.]

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